DOCKET

No. 08-1107
Title: The Hertz Corporation, Petitioner
v.
Melinda Friend, et al.
Docketed: March 5, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-80011)
Decision Date: October 30, 2008
Rehearing Denied: December 5, 2008
Questions Presented

Date	Proceedings and Orders
Mar 2 2009	Petition for a writ of certiorari filed. (Response due April 6, 2009)
Mar 23 2009	Supplemental brief of petitioner filed.
Mar 26 2009	Order extending time to file response to petition to and including May 6, 2009.
Apr 6 2009	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Apr 6 2009	Brief amicus curiae of California Retailers Association filed.
May 6 2009	Brief of respondents Melinda Friend, et al. in opposition filed.
May 14 2009	Reply of petitioner The Hertz Corporation filed. (Distributed)
May 19 2009	DISTRIBUTED for Conference of June 4, 2009.
Jun 8 2009	Petition GRANTED.
Jul 13 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 10, 2009.
Jul 31 2009	Motion to dispense with printing the joint appendix filed by petitioner The Hertz Corporation.
Aug 10 2009	Brief of petitioner The Hertz Corporation filed.
Aug 17 2009	SET FOR ARGUMENT ON Tuesday, November 10, 2009
Aug 17 2009	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Aug 20 2009	CIRCULATED.
Aug 21 2009	Record received from U.S.C.A for 9th Circuit. (1 envelope)
Aug 25 2009	Record received (1 volume) received from the U.S.D.C. for the Northern District of California. (1envelope) The remainder of this record is electronic.
Aug 28 2009	The time within which to file respondents' brief on the merits is extended to and including September 29, 2009.
Sep 4 2009	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 29 2009	Brief of respondents Melinda Friend, et al. filed. (Distributed)
Oct 6 2009	Brief amicus curiae of Legal Aid Society - Employment Law Center filed. (Distributed)
Oct 28 2009	Reply of petitioner The Hertz Corporation filed. (Distributed)
Nov 10 2009	Argued. For petitioner: Sri Srinivasan, Washington, D.C. For respondents: Todd M. Schneider, San Francisco, Cal.

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No. 08-081107

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, a court can disregard the location of a nationwide corporation's headquarters – i.e., its nerve center.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and appellant below is The Hertz Corporation.

The Respondents here and appellees below are Melinda Friend and John Nhieu. By virtue of the allegations contained in their Complaint, the Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The Hertz Corporation is a wholly owned subsidiary of Hertz Global Holdings, Inc., a publicly traded corporation on the New York Stock Exchange. No publicly traded corporation owns 10% or more of Hertz Global Holdings, Inc.'s common stock.

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Petitioner The Hertz Corporation ("Hertz") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in *Melinda Friend, et al. v. Hertz Corporation*, No. 08-16963.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this Petition is unpublished, but is available at 297 F. Appx. 690, 2008 WL 4750198 (9th Cir. 2008) and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a – 3a.[1/] The opinion of the district court at issue in the appeal to the Ninth Circuit was issued on January 15, 2008 in the case of *Melinda Friend, et al. v. Hertz Corporation*, Case No. C-07-5222 MMC. *Id.* at 4a – 11a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its judgment and opinion on October 30, 2008. By Order dated December 5, 2008, the court denied rehearing and rehearing *en banc*. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

1/ Hereinafter, the United States Court of Appeals for the Ninth Circuit will be referred to as "the Ninth Circuit," and other United States Courts of Appeals will be referred to as "the First Circuit," "the Second Circuit," and so forth.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(c)(1) provides, in relevant part, that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

STATEMENT OF THE CASE

This case involves the meaning of the phrase "principal place of business" as used in 28 U.S.C. § 1332(c)(1). As this Court previously has recognized, albeit in a very different context:

> In deciding whether a location is "the principal place of business," the commonsense meaning of "principal" suggests that a comparison of locations must be undertaken. This view is confirmed by the definition of "principal," which means "most important, consequential or influential." Webster's Third New International Dictionary 1802 (1971). Courts cannot assess whether any one business location is the "most important, consequential or influential" one without comparing it to all the other places where business is transacted.

Comm'r of Internal Revenue v. Soliman, 506 U.S. 168, 174, 113 S. Ct. 701, 706 (1993)(construing

principal place of business as used in 26 U.S.C. § 280A(c)(1)(A) of the Internal Revenue Code).[2/]

The circuit courts have divided into a deep four-way split regarding the tests to be applied in locating a corporation's principal (most important, consequential or influential) place of business for purposes of diversity jurisdiction. These tests range from the Seventh Circuit's "nerve center test," which focuses on locating the corporation's "brain," and ignores all other business operations as irrelevant, to the Ninth Circuit's "place of operations test," which focuses on the locations of the corporation's business operations, while generally ignoring its nerve center. Unlike either of these tests, the Third Circuit's "center of corporate activities test" focuses on finding the center of day-to-day corporate-wide activity and management, with the locations of other business activities being relevant, but less important, factors. Finally, the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits' "totality of the circumstances test" hinges on no particular facet of corporate activities, but rather on the company as a whole, including its character, business purpose, nerve center, management center and locations of operations.

2/ While the definition of principal place of business in *Soliman* related to the substantive issue of a tax deduction for a home office, and not the issue of a corporation's principal place of business for purposes of determining federal court diversity jurisdiction, statutory terms are generally interpreted in accordance with their ordinary meaning. *BP America Prod. Co. v. Burton*, 549 U.S. 84, 90, 127 S. Ct. 638, 644 (2006).

Hertz seeks a writ of certiorari so that this Court can resolve this circuit split regarding the proper method for locating a corporation's principal place of business for purposes of diversity jurisdiction. This conflict presents an important question of federal law since "parties ought to know definitely what court they belong in, and not face the prospect that their litigation may be set at naught because they made a wrong guess about jurisdiction." *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1191 (7th Cir. 1986) (Posner, J.). Absent resolution of this conflict, corporations can be (and are being) deemed to have more than one principal place of business for purposes of diversity jurisdiction, a result not permitted by the plain wording of 28 U.S.C. § 1332(c)(1). In addition, corporations will be deprived of the protections intended by the "minimal" diversity provisions of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), in a jurisdiction with a penchant for class action litigation, i.e., California, simply because their business activities in that state are roughly commensurate with its rank as the most populous state in the Union.

I. Basis for Federal Jurisdiction and Procedural Summary

On September 6, 2007, Respondents Melinda Friend and John Nhieu filed this putative class action in California state court seeking damages for alleged violations of California's wage and hour laws. Pursuant to the removal provisions of CAFA, Hertz timely removed the action to the District Court for

the Northern District of California. On November 27, 2007, Respondents filed a motion to remand; or, in the alternative, a request for discovery regarding Hertz' principal place of business. In support of their remand motion, Respondents argued that Hertz was a citizen of the State of California and that diversity of citizenship did not exist between Hertz and members of the putative class. On January 15, 2008, the district court granted Respondents' motion based on the court's conclusions that "a plurality" of Hertz' business activities occur in California and that "Hertz is not the type of litigant that diversity jurisdiction was designed to protect." *See* District Court Order Granting Plaintiffs' Motion to Remand, reprinted at Pet. App. 4a – 11a.

Pursuant to 28 U.S.C. § 1453(c)(1), Hertz sought discretionary review of the district court's remand order by the Ninth Circuit. The Ninth Circuit initially denied Hertz' petition for review. *See* Ninth Circuit Order, reprinted at Pet. App. 12a. Hertz then moved for reconsideration or, in the alternative, rehearing *en banc*, and the court vacated its prior denial and agreed to review the remand order. *See* Ninth Circuit Order, reprinted at Pet. App. 13a – 14a.

On review, the Ninth Circuit concluded that the district court had correctly applied the circuit's "place of operations" test as articulated in *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990)("the 'nerve center' test should be used only when no state contains a substantial predominance of the corporation's business

activities") and *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001)(substantial predominance "requires only that the amount of corporation's business activity in one state be significantly larger than any other state in which the corporation conducts business"). In a further refinement of this test, the panel below found that no "policy concerns" justified taking California's population into account when determining whether a corporation's business activities in California were significantly larger than in any other single state. *See* Memorandum Opinion, reprinted at Pet. App. 1a – 3a. The Ninth Circuit subsequently denied rehearing and rehearing *en banc* and this Petition timely followed. *See* Ninth Circuit Order, reprinted at Pet. App. 15a.

II. Factual Summary

The facts relevant to the issues presented are undisputed.[3/] Hertz is incorporated in Delaware and

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[3/] Consistent with the requirements of 28 U.S.C. § 1446(a), Hertz' Notice of Removal contained "a short and plain statement of the grounds for removal," supported by a sworn declaration showing that Hertz was incorporated in Delaware, with its principal place of business in New Jersey. *See Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008)("removing party's notice of removal sufficiently establishes jurisdictional grounds for removal by making jurisdictional allegations in the same manner" as a plaintiff would be required in their original complaint); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785 (1936)(a party asserting jurisdiction must allege facts essential to show jurisdiction and must support them by competent proof if challenged by his adversary or by the court).

operates "on-airport" and "off-airport" rental facilities in 44 of the 50 states. Pet. App. 26a at ¶ 3. The leadership of Hertz is found at its corporate headquarters in Park Ridge, New Jersey. *Id.* at ¶ 11. The core executive and administrative functions for Hertz' domestic operations are carried out in New Jersey and, to a lesser extent, Oklahoma. *Id.* Hertz' overall executive and administrative functions are not found in the State of California. *Id.*

During the period relevant to Hertz' removal of this action to federal court, 83% of Hertz' rental facilities were located in states other than California, 81.8% of its vehicle rentals were transacted in states other than California, 81.4% of its total revenues were generated in states other than California and 79.5% of its entire workforce were employed in states other than California. *Id.* at ¶¶ 6 - 9.

As relevant to the Ninth Circuit's place of operations test, which compares business activities between the two states containing the largest amount of those activities: (1) 17% of Hertz' rental facilities were located in California and 9.7% were located in Florida; (2) 18.2% of Hertz' vehicle rentals were transacted in California and 10.7% were transacted in Florida; (3) 18.6% of Hertz' revenues were generated in California and 11.6% were generated in Florida; and, (4) 20.5% of Hertz'

While Respondent requested discovery with respect to Hertz' principal place of business, it offered no facts controverting the allegations made in support of removal, and the district court did not challenge any of them.

employees were employed in California and 14.3% were employed in Florida. *Id.*

Similar to its requests in the District Court and Ninth Circuit, Hertz requests that this Court take judicial notice of the U.S. Bureau of the Census population figures for 2006 (est.) as follows: United States 299,398,484, California 36,457,549 (12.2% of U.S. total), Florida 18,089,888 (6.0%), Texas 23,507,783 (7.9%), Illinois 12,831,970 (4.3%), and New York 19,306,183 (6.5%). *See* U.S. Census Bureau, State & County QuickFacts, *available at* http://quickfacts.census.gov/qfd, (last visited February 2, 2009).[4/]

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts Are Deeply Divided Over How to Determine a Corporation's Principal Place of Business for Purposes of Diversity Jurisdiction

The circuit courts have developed four different tests for determining a corporation's principal place of business: (1) the nerve center test, which focuses exclusively on locating the corporation's "brain," without regard to the location of its other business activities; (2) the center of

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4/ In its filings in the District Court and the Ninth Circuit, Hertz presented population figures for 2005 from the U.S. Census Bureau's "QuickFacts" website as they were the most current data available at that time. The 2006 population figures are not materially different.

corporate activities test, which focuses primarily on locating the headquarters of day-to-day corporate activities and management, but permits consideration of the location of other business activities as relevant (but less important) factors; (3) the place of operations test, which focuses exclusively on the location of the corporation's business activities, and only considers the location of its nerve center if those business activities do not substantially predominate in any one state; and, (4) the total activities test, which requires a fact-intensive inquiry and focuses on no one factor to the exclusion of others, and requires consideration of factors such as the character of the corporation, its purposes, the kind of business in which it is engaged, the situs of its operations and the location of its headquarters.

Due to their differing emphases, these tests result in different outcomes with respect to the location of a corporation's principal place of business. For example, a court which applies the nerve center test will locate a corporation's principal place of business in one state, though a court applying the place of operations test would likely locate it in another. However, the very wording of 28 U.S.C. § 1332(c)(1) makes clear that a corporation can have one, and only one, principal place of business.

A. Nerve Center Test

The Seventh Circuit uses the nerve center test as its sole method for determining a corporation's principal place of business for purposes of diversity

jurisdiction. Under this test, a district court is to look for the location of "the corporation's brain," which ordinarily is found "where the corporation has its headquarters." *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986); *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991)("this court follows the 'nerve center' approach to corporate citizenship: a corporation has a single principal place of business where its executive headquarters are located").

In adopting this test, the Seventh Circuit recognized that other circuits "use a vaguer standard . . . [and] look not just to where the corporation has its headquarters but also to the distribution of the corporation's assets and employees . . . [but w]e prefer [a] simpler test. Jurisdiction ought to be readily determinable." *Wisconsin Knife* Works, 781 F.2d at 1282. Consequently, the amount of business that a corporation transacts in any particular state is "irrelevant" to the Seventh Circuit's test for locating its principal place of business. *Metropolitan Life Ins. Co.*, 929 F.2d at 1223 ("that Metropolitan Life does lots of business in Illinois is accordingly irrelevant, so long as the record reveals (as it does) that its 'principal' place of business [i.e., nerve center] is elsewhere").

B. Center of Corporate Activities Test

The Third Circuit uses the center of corporate activities test as its sole method for locating a corporation's principal place of business for purposes of diversity jurisdiction. Under this test, a district

court is to look for the location of the corporation's "headquarters of day-to-day corporate activity and management." *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960). The center of corporate activities test is similar to the nerve center test in the sense that it looks for a "headquarters," albeit of day-to-day corporate activities and management. However, unlike the nerve center test, the location of the corporation's plants, employees, etc., are relevant considerations, but they are "elements of lesser importance" in the determination. *Id.* at 854; *see also Mennen Co. v. Atlantic Mut. Ins. Co.*, 147 F.3d 287, 291 (3rd Cir. 1998)(*Kelly* requires a court to locate a corporation's headquarters for day-to-day activity and management, with the location of plants, employees, etc., being considerations of lesser importance, but some significance).

C. Place of Operations Test

In direct conflict with the tests applied by the Seventh and Third Circuits, the Ninth Circuit considers the location of a corporation's plants, employees, and assets, to be factors of paramount importance in locating its principal place of business for purposes of diversity jurisdiction. Under the Ninth Circuit's test, a corporation must first prove that no single state contains a substantial predominance of its business activities before the district court can consider the location of the corporation's nerve center or its headquarters of day-to-day corporate activities and management. *Industrial Tectonics*, 912 F.2d at 1094 ("nerve center test should be used only when no state contains a

substantial predominance of the corporation's business activities")(emphasis supplied).

According to the Ninth Circuit, a corporation fails to meet this burden when its business activities in one state, e.g., plants, employees, revenues, etc., are "significantly larger" than the next largest state. *Tosco Corp.*, 236 F.3d at 500 ("substantial predominance . . . requires only that the amount of corporation's business activity in one state be significantly larger than any other state in which the corporation does business"). Thus, the place of operations test does not make a comparison of all the places where business is transacted, i.e., the location of the corporation's nerve center, the location(s) of its day-to-day management and the location(s) of all its other business activities. Rather, it only considers whether business activities (in terms of facilities, employees, revenues, etc.) are "significantly larger" in one state in comparison to the one other state containing the next largest amount of such business activities. Further, as for the comparison of business activities between these two states, the Ninth Circuit has stated that there is no need to consider whether the difference between the two is in proportion to populations of the states being compared. *See* Ninth Circuit Opinion and Judgment, reprinted at Pet. App. 1a, 3a.

D. Total Activities Test

The Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits apply the total activities test in locating a corporation's principal place of business for purposes

of diversity jurisdiction. *See, e.g., Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004); *Gafford v. General Elec. Co.*, 997 F.2d 150, 163 (6th Cir. 1993); *Capitol Indemnity Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 836 (8th Cir. 2004); *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993); *MacGinnitie v. Hobbs Group*, LLC, 420 F.3d 1234, 1239 (11th Cir. 2005). Pursuant to this test, a district court is to consider not only the location of the corporation's nerve center, and the locations of its business activities, but also the totality of the surrounding circumstances, including things like the character of the corporation, its purposes and the kind of business in which it is engaged. *See, e.g., Gafford*, 997 F.2d at 161; *Amoco Rocmount Co.*, 7 F.3d at 915 . Unlike the other tests described above, the total activities test "does not hinge on one particular facet of corporate operations, but on the total activity of the company considered as a whole." *Amoco Rocmount Co.*, 7 F.3d at 915.[5/]

[5/] The First, Second and Fourth Circuits have yet to formally adopt any one of the tests described above. Rather, they recognize that the nerve center and place of operations tests may point to different locations as a corporation's principal place of business and have provided guidance for selecting between the two, e.g., nerve center test should apply to corporations with far flung activities, but the center of corporate activities test or place of operations test should apply when operations are not far flung. *See, e.g., Topp v. CompAir, Inc.*, 814 F.2d 830, 834 (1st Cir. 1987)(recognizing that courts apply varying tests for determining principal place of business depending upon the factual circumstances of the corporation at issue); *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979)(providing guidance for selection between

II. The Split Between the Circuits Implicates Important Questions of Federal Law that Should be Decided by This Court

A. Absent Resolution by This Court, Corporations Will be Subject to Having More than One Principal Place of Business for Purposes of Diversity Jurisdiction

"By common sense and by law, a corporation can have only one principal place of business for purposes of establishing its state of citizenship." *Gafford*, 997 F.2d at 161; *see also J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 406 (5th Cir. 1987)("the amendment makes clear that every corporation has one and only one principal place of business"); 28 U.S.C. § 1332(c)(1)("a corporation shall be deemed to be a citizen of any state by which it has been incorporated and the state where it has its principal place of business") (emphasis supplied). However, pursuant to the various tests which district courts have been instructed to use by their respective circuit courts of appeal, corporations are subject to the distinct possibility of having more than one principal place of business; a result at odds with the clear language of the diversity jurisdiction statute.

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nerve center test and place of operations test); *Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998)(approving use of either the nerve center test or place of operations test, with neither to the exclusion of the other).

For example, in *Burgos v. United Airlines, Inc.*, 2002 WL 102607, at *6 (N.D. Cal. Jan. 11, 2002), the district court concluded that United Airlines' principal place of business was in California. In doing so, the district court applied the Ninth Circuit's place of operations test, i.e., it compared United Airlines' business activities in the state at issue, California, to the state containing the next largest amount of such activities, and it did so without regard to the location of its headquarters (whether that be the nerve center or its center of corporate activities). However, pursuant to the nerve center test, a district court in the Seventh Circuit would be required to locate, and has previously located, United's principal place of business at its corporate headquarters in Illinois. *See, e.g., Kohtz v. United Airlines*, 1991 WL 171330, at *1 (N.D. Ill. Aug. 29, 1991)(granting United's motion to dismiss federal court action for lack of diversity jurisdiction due to United's principal place of business being located in Elk Grove, Illinois, the location of its corporate headquarters).

The outcome identified above is not limited to the conflict between the nerve center and place of operations tests. Thus, a district court applying the total activities test has located a corporation's principal place of business in a state other than the one containing its nerve center, and it did so on the basis of facts which would not be considered in applying the nerve center test, e.g., the nature of its business activities and the situs of its operations; *see, e.g., Shell Rocky Mountain Production, LLC v. Ultra Resources, Inc.*, 415 F.3d 1158, 1163 (10th Cir.

2005)("[i]rrespective of whether Houston constitutes Ultra's nerve center, an evaluation of Ultra's total activity convinces us that there is ample evidence to justify the district court's conclusion that Ultra's principal place of business is either Wyoming or Colorado").

Due to the split between the circuits with respect to the appropriate test to apply in determining a corporation's principal place of business for purposes of diversity jurisdiction, a district court in California (pursuant to the place of operations test), a district court in Illinois (pursuant to the nerve center test), and a district court in Wyoming (pursuant to the total activities test), could locate the same corporation's principal place of business in three different states. Such results are not permitted by 28 U.S.C. § 1332(c)(1) and these corporations either would be deprived of the federal forum that diversity jurisdiction is intended to provide or subjected to a legal proceeding for which jurisdiction was lacking.

B. The Effect of the Ninth Circuit's Approach Will be That Nationwide Corporations Will be All Deemed California Citizens

Absent review by this Court, not only will corporations be subject to having more than one principal place of business for purposes of diversity jurisdiction, but corporations with nationwide business operations, including operations in California commensurate with its population,

invariably will have one of these multiple principal places of business located in California. Thus, it is beyond dispute that Hertz transacts business in 44 states, approximately 80% of all its business activities (in terms of employees, facilities, rentals and revenues) are located outside of California, and the headquarters from which it operates this business is located in New Jersey. Nonetheless, pursuant to the place of operations test, the court ignored the nationwide scope of Hertz' business activities, and the location of the headquarters from which it exercises control over its far flung operations, and simply compared Hertz' business activities in the state at issue, California, to the next largest state in terms of those activities, Florida. Moreover, the court made this comparison without regard to the fact that California's population is more than double that of Florida.

As has already happened to United Airlines and Hertz, numerous other corporations with nationwide business activities, and business activities in California commensurate with its size and population, will be deemed to have a principal place of business in California pursuant to such a place of operations test. This result is contrary to the underlying purposes of diversity jurisdiction in general and, CAFA jurisdiction in particular.

With respect to the underlying purposes of diversity jurisdiction in general, the legislative history of the 1958 amendments to 28 U.S.C. § 1332(c)(1) recognized that "the underlying purpose of diversity of citizenship legislation . . . is to provide a

separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts." S. Rep. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3102. The existence of such diversity jurisdiction was recognized as being essential to both the proper administration of justice and the free flow of commerce. *Id.* at 3116-3119.

Consistent with the above-described purposes of diversity jurisdiction, the principal place of business provision of 28 U.S.C. § 1332(c)(1) was added to address "the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the federal courts simply because it has obtained a corporate charter from another state." *Id.* at 3101-3102. After rejecting a suggestion that corporations be deemed citizens of every state in which they do business, as well as a suggestion that a corporation be deemed to be a citizen of the state where more than half of its gross income is received, *Id.* at 3119-3120, the Committee on Jurisdiction and Venue settled on the recommendation that a corporation be deemed to be a citizen of the state containing its principal place of business. *Id.* at 3132. According to the Committee, this provision provided a "simpler and more practical formula" for locating a corporation's citizenship, "while at the same time preserving the purpose of [its] previous recommendations to prevent frauds and abuses of the federal jurisdiction by corporations which are primarily local in character." *Id.* The Ninth Circuit's test disregards these principles and will result in

nationwide corporations, with far flung activities spread across many states, being deemed to be citizens of California simply because they have operations in that state commensurate with its population. Such corporations, however, are not "primarily local in character," and they have engaged in no "fraud or abuse" with respect to federal jurisdiction. Nonetheless, the test being applied by the Ninth Circuit will result in such corporations losing the protections intended by diversity jurisdiction with the potential for resulting interference with interstate commerce.

With respect to CAFA jurisdiction in particular, the Senate Report which accompanied CAFA recognized

> [a] mounting stack of evidence . . . demonstrat[ing] that abuses [in class action litigation] are undermining the rights of both plaintiffs and defendants . . . [with] [o]ne key reason for these problems . . . [being] that most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently . . . and where there is often inadequate supervision over litigation procedures and proposed settlements.

S. Rep. 109-14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5.

In an effort to deal with these abuses, which included "copycat class actions," and the use of class action devices as "judicial blackmail," Congress enacted CAFA for the express purpose of substantially expanding federal court jurisdiction over class actions. *Id.* at 23. This expansion was intended to address the abuses previously noted, as well as others, all of which were recognized as having the potential for interfering with interstate commerce. *Id.* at 5-6. Despite these underlying purposes of CAFA, nationwide corporations with operations in California commensurate with that state's population will be deprived of the statute's protections in a jurisdiction with a penchant for class action litigation.

C. This Court Infrequently Has the Opportunity to Review Principal Place of Business Issues

This Court has not previously addressed the proper test for locating a corporation's principal place of business for purposes of diversity jurisdiction, and its opportunities for doing so are limited. First, remand orders in traditional diversity cases are not subject to appellate review. *See* 28 U.S.C. § 1447(d)("[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ."); *see also Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-128, 116 S. Ct. 494, 497 (1995)("[a]s long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction . . . a court of appeals lacks jurisdiction to

entertain an appeal of the remand order under [28 U.S.C.] § 1447(d)"). Second, remand orders in CAFA cases are subject to discretionary review only. *See* 28 U.S.C. § 1453(c)(1)("a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed . . ."). Consequently, this is an important issue relating to federal court jurisdiction which may evade review for many years to come.

CONCLUSION

The "prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts . . . ." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 7, 71 S. Ct. 534, 537 (1951). As evidenced by the circuit split described above, such "definite and finally accepted" principles do not exist with respect to determining the location of a corporation's principal place of business for purposes of diversity jurisdiction.

Hertz respectfully submits that a test for determining a corporation's principal place of business for purposes of diversity jurisdiction should be guided by: (1) the ordinary meaning of those words, i.e., the most important, consequential or influential place of business in comparison to all others; (2) the underlying purposes of diversity jurisdiction, e.g., protecting out-of-state citizens

against the bias of local tribunals and promoting the free flow of commerce; and, (3) Congress' expressed reasons for adding the principal place of business provision to 28 U.S.C. § 1332(c)(1), i.e., "a simple [and] practical" method for readily determining the existence of jurisdiction, which also allows judges to protect against "frauds and abuses of federal jurisdiction by corporations which are primarily local in character." S. Rep. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3132.

The Ninth Circuit's place of operations test, which reduces a corporation's nerve center to an afterthought, does not comport with the ordinary meaning of the statute, it is not tailored to address the "evil" which prompted Congress to amend the statute, and it is inconsistent with the underlying purposes of diversity jurisdiction. Corporations like Hertz, United Airlines, Target, Home Depot and countless others, who do business in California commensurate with its population, are not California institutions, engaged in a California business, while seeking to avoid the jurisdiction of California state courts through some fraud or artifice. Rather, they are nationwide corporations, headquartered and operated from states outside of California.

Hertz respectfully submits that this Court should grant certiorari in order to establish definite and accepted principles pursuant to which federal courts can readily and uniformly determine their jurisdiction in a manner consistent with the wording of 28 U.S.C. § 1332(c)(1), and the underlying purposes of diversity jurisdiction.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 30, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 08-80011

D.C. NO. CV-07-05222-MMC

MELINDA FRIEND, ET AL.,

Plaintiffs-Respondents,

v.

THE HERTZ CORPORATION,

Defendant-Petitioner.

MEMORANDUM*/

Appeal from the United States District Court for the Northern District of California
Maxine M. Chesney, District Judge

Argued and Submitted October 21, 2008
Pasadena, California

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*/ This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Before: FERNANDEZ, CALLAHAN, and IKUTA, Circuit Judges.

Hertz's Notice of Appeal makes clear that Hertz removed this class action under the Class Action Fairness Act (CAFA). 28 U.S.C. § 1453(c). Therefore, even assuming we lack authority "to accept an appeal from the denial of a motion to remand when a class action has been removed to federal court on the basis of traditional diversity jurisdiction," *Saab v. Home Depot U.S.A., Inc.*, 469 F.3d 758, 759 (8th Cir. 2006), rather than pursuant to CAFA, we have jurisdiction over Hertz's timely appeal from the district court's order remanding this class action to state court. 28 U.S.C. § 1453(c)(1).

The district court correctly applied the "place of operations" test to determine Hertz's principal place of business. *Tosco Corp. v. Communities for a Better Env't.*, 236 F.3d 495 (9th Cir. 2001); *Industrial Tectonics v. Aero Alloy*, 912 F.2d 1090 (9th Cir. 1990). Taking the facts as set forth in the Declaration of Krista Memmelaar, Hertz's relevant business activities are "significantly larger" in California than in the next largest state, Florida. Although the difference between the amount of Hertz's business activity in California and the amount of its activity in Florida is not as large as the difference deemed to be significant in *Tosco*, California nevertheless "contains a substantial predominance" of Hertz's operations. *Tosco Corp.*, 236 F.3d at 500.

Appendix A

Neither *Tosco* nor *Industrial Tectonics* supports Hertz's argument that we must consider the comparative population of states in which a corporation operates to determine whether activities are significantly larger in one state than another. *Id.*; *Industrial Tectonics*, 912 F.2d at 1092. Nor do policy concerns mandate the application of a per capita calculation. With its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts.

Because California is Hertz's principal place of business under the "place of operations" test, we do not apply the nerve center test. *Tosco*, 236 F.3d at 500.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 15, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CASE NO. C-07-5222 MMC

MELINDA FRIEND, ET AL.,

Plaintiffs,

v.

HERTZ CORPORATION,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND; VACATING HEARING

Before the Court is plaintiffs' motion to remand, filed November 27, 2007. Defendant has filed opposition, to which plaintiffs have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision thereon, VACATES the hearing scheduled for January 4, 2008, and rules as follows.

Appendix B

BACKGROUND

In their complaint, initially filed in state court, plaintiffs allege state law claims on behalf of a class, arising from defendant's asserted failure to provide the class "overtime wages, "meal and rest breaks," and "vacation pay." (See Compl. ¶ 1.) On October 11, 2007, defendant removed the action to district court, alleging diversity jurisdiction under 28 U.S.C. § 1332(d)(2), which provides that a district court has jurisdiction over a class action in which the matter in controversy exceeds $5,000,000 and "any member of a class of plaintiffs is a citizen of a State different from any defendant." See 28 U.S.C. § 1332(d)(2). In the Notice of Removal, defendant alleges the amount in controversy exceeds $5,000,000, that each class member is a citizen of California, and that defendant is a citizen of Delaware, its state of incorporation, and of New Jersey, its principal place of business. By the instant motion, plaintiffs argue that defendant has failed to show that its principal place of business is a state other than California, and, consequently, has failed to establish the existence of diversity of citizenship.

LEGAL STANDARD

Once an action has been removed, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." See 28 U.S.C. § 1447(c). In considering the propriety of removal, a district court

must "strictly construe the removal statute against removal jurisdiction," and jurisdiction "must be rejected if there is any doubt as to the right of removal in the first instance." See Gaus v. Miles, Inc., 980 F. 2d 564, 566 (9th Cir. 1992). This "'strong presumption' against removal jurisdiction means that the defendant always has the burden of proving that removal is proper." See id.

DISCUSSION

Plaintiffs do not dispute that the amount in controversy exceeds $5,000,000, that each class member is a citizen of California, and that defendant is incorporated in Delaware. Consequently, in order to meet its burden of demonstrating removal is proper, defendant must establish that its principal place of business is a state other than California.

Where the majority of a corporation's business activity does not take place in one state, the state in which the corporation's business activity is "significantly larger than any other state in which the corporation conducts business" is the corporation's principal place of business. See Tosco Corp. v. Communities for a Better Environment, 236 F. 3d 495, 500-02 (9th Cir. 2001). In determining whether a corporation's business activity "substantially predominates in a given state," a district court must make a "comparison of that corporation's business activity in the state at issue to its business activity in other individual states." See

id. at 500. In making such comparison, the court "employs a number of factors," including "the location of employees, tangible property, production activities, sources of income, and where sales take place." See id.; id. at 497, 500-02 (holding that although corporation did not employ plurality of employees in California, but did have plurality of manufacturing and retailing locations in California, and generated plurality of sales in California, California was principal place of business). If, however, "no state contains a substantial predominance of a corporation's business activities," the corporation's principal place of business is its "nerve center," which is "the state where the majority of its executive and administrative functions are performed." See id. at 500 (applying "place of operations test"; noting corporation failed to offer sufficient evidence of business activity in other state that could "reasonably compare" to amount of operations in California).

Here, defendant's position is that it does not have a substantial predominance of its activities in California or any other state and, as a result, its principal place of business is New Jersey, where it performs the majority of its "core executive and administrative functions." (See Memmelaar Decl. ¶ 11.) In support of its argument, defendant submits evidence as to several of the Tosco factors. Specifically, defendant offers evidence of the location of its employees, tangible property, sources of income, and where its sales (rentals) occur. As to

every one of these factors, the plurality of activity occurs in California, and the next greatest amount of activity occurs in Florida: 2299 of defendant's employees work in California (20.5% of its employees), compared to 1602 employees in Florida (14.3% of its employees); 273 of defendant's "profit-center rental locations" are located in California (17% of its tangible property), as compared to 155 such locations in Florida (9.7% of its tangible property)[6/]; in the last year for which information is available, defendant earned $811 million from its operations in California (18.6% of its earned revenue), as compared to $505 million in Florida (11.6% of its earned revenue); and, in the last year for which information is available, defendant "processed" 3,801,000 rentals in California (18.2% of its rentals), as compared to 2,245,000 rentals in Florida (10.7% of its rentals). (See Memmelaar Decl. ¶¶ 6-9.)[7/] Put another way, defendant employs over 43% more employees in California than in Florida, holds over 75% more tangible property in California than in Florida, earns over 60% more revenue in California than in Florida,

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[6/] Defendant provides no information as to the location of any tangible property other than such rental locations.

[7/] The figures provided by defendant as to location of employees and tangible property are for the quarter ending June 30, 2007, (see id. ¶¶ 6-7); the figures provided as to source of income and place of rentals are for the year 2006, "the last full year for which data is available," (see id. ¶¶ 8-9).

and processes over 70% more rentals in California than in Florida.

Where, as here, a plurality of each of the relevant business activities is in one state, and the differential between the amount of those activities in that state and the next closest state is "significant," see Tosco, 236 F. 3d at 500, the former state is the corporation's principal place of business. See, e.g., Ghaderi v. United Airlines, Inc., 136 F. Supp. 2d 1041, 1047-48 (N.D. Cal. 2001) (holding where corporation did not conduct majority of activities in any state, but where its activity in each relevant category was "between 20% and 33% greater in California than it is in [next closest state]," California was corporation's principal place of business); Arellano v. Home Depot U.S.A., 245 F. Supp. 2d 1102, 1106-1108 (S.D. Cal. 2003) (holding where corporation employed plurality of workforce in California, but owned more tangible property in both Georgia and Texas than in California, California was not corporation's principal place of business). As the Ninth Circuit observed in Tosco, a corporation that is a "major employer and business operator in California," even though it conducts business in most states and does not conduct the majority of its operations in California, "is not the type of litigant that diversity jurisdiction was designed to protect. See Tosco, 236 F. 3d at 502.

Defendant argues that where a corporation's business activities are "spread among many states,"

no one state should be considered to be "dominant" over the others.[8] (See Def.'s Opp. at 4:6-7.) Defendant's argument, was implicitly rejected by the Ninth Circuit in Tosco, in which the corporation therein did business in at least 34 states, see Tosco, 236 F.3d at 497, 501 (holding California was corporation's principal place of business).[9] Defendant also asks the Court to take judicial notice of the fact that California's population is larger than that of Florida, and argues its substantially greater presence in California is a reflection of California's larger population. Again, defendant's argument has been implicitly rejected by the Ninth Circuit; in Tosco, the Ninth Circuit compared the actual amount of activity in California to that in the next closest states, and did not adjust the figures to compensate for differences in population. See id. at 497, 500-02. In sum, the Court finds defendant has failed to meet its burden to show its principal place of business is other than California. Accordingly, defendant has

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[8] Defendant does business in 44 states. (See Memmelaar Decl. ¶ 10.)

[9] Indeed, as noted, the Ninth Circuit found California to be the corporation's principal place of business, even though the plurality of activity with respect to one relevant factor was not in California. See id. at 500-02 (holding, where 24% of corporation's employees worked in Arizona, as compared to 21% in California, California nonetheless was corporation's principal place of business, because corporation's activity in California otherwise "outweigh[ed]" its activity in Arizona or any other state).

failed to establish that the Court has subject matter jurisdiction over the instant action.

CONCLUSION

For the reasons stated, plaintiffs' motion to remand is hereby GRANTED, and the above-titled action is hereby REMANDED to the Superior Court of the State of California, in and for the County of Alameda.

IT IS SO ORDERED.

Dated: January 15, 2008 s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District
Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 17, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 08-80011

D.C. NO. CV-07-05222-MMC

MELINDA FRIEND, ET AL.,

Plaintiffs-Respondents,

v.

THE HERTZ CORPORATION,

Defendant-Petitioner.

ORDER

Before: FISHER and PAEZ, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 5, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 08-80011

D.C. NO. CV-07-05222-MMC

MELINDA FRIEND, ET AL.,

Plaintiffs-Respondents,

v.

THE HERTZ CORPORATION,

Defendant-Petitioner.

ORDER

Before: FISHER and PAEZ, Circuit Judges.

Petitioner's motion for reconsideration of the court's April 17, 2008 order is granted. The April 17, 2008 order is vacated and the petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is granted. The motion for reconsideration en banc is denied as moot.

Appendix D

Within 10 days after the filing date of this order, petitioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

Pursuant to 28 U.S.C. § 1453(c)(2), the court shall complete all action on this appeal, including rendering judgment, not later than 60 days after the date on which the appeal was filed. *See also Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 685 (9th Cir. 2005) (stating that 60-day time period begins to run when the court accepts the appeal). Accordingly, the parties shall file simultaneous briefs in the Clerk's Office in San Francisco by 3:00 p.m. on September 15, 2008.

Rule 6(c)(1) of the Administrative Order Regarding Electronic Filing shall not apply to this appeal. Accordingly, the parties shall file 10 copies of the brief in paper format, accompanied by certification that the brief is identical to the version submitted electronically.

Each brief shall be received in the office of opposing counsel on the date the brief is due in this court.

Any motion to extend time to file the briefs shall strictly comply with the requirements set forth in 28 U.S.C. § 1453(c)(3).

The Clerk shall calendar this case during the week of October 20-24, 2008 in Pasadena, California.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 5, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 08-80011

D.C. NO. CV-07-05222-MMC

MELINDA FRIEND, ET AL.,

Plaintiffs-Respondents,

v.

THE HERTZ CORPORATION,

Defendant-Petitioner.

ORDER

Before: FERNANDEZ, CALLAHAN, and IKUTA, Circuit Judges.

The Petition for Rehearing En Banc and the Request for Judicial Notice are **DENIED**.

APPENDIX F — NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. § 1332(d) AND 28 U.S.C. § 1441(a) IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED OCTOBER 11, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CASE NO. 3:07-CV-05222-MMC

MELINDA FRIEND, ET AL.,

Plaintiffs,

v.

THE HERTZ CORPORATION, ET AL.,

Defendant.

NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. § 1332(d) AND 28 U.S.C. § 1441(a)

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO PLAINTIFFS MELINDA FRIEND, JOHN NHIEU AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant The Hertz Corporation ("Defendant" or "Hertz") files this

Appendix F

Notice of Removal. The above-entitled case is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332(d) and is one that may be properly removed to this Court pursuant to 28 U.S.C. § 1441. In compliance with 28 U.S.C. § 146(a), Hertz asserts the following grounds for removal:

1. On or about September 6, 2007, Plaintiffs Melinda Friend and john Nhieu ("Plaintiffs") commenced the aforementioned action against Hertz by filing a Complaint in the Superior Court of the State of California, County of Alameda, entitled *Melinda Friend and John Nhieu, et al. v. The Hertz Corporation, et al.*, Case No. RG 07 344896 (hereinafter the "State Court Action").

2. True and correct copies of Plaintiff's Class Action Complaint, along with the papers which accompanied the Complaint, are attached as Exhibit A hereto.

3. Hertz initially received the Complaint by personal service on its agent on September 13, 2007.

4. On October 11, 2007, Hertz filed in the State Court its Answer to the Complaint, as required by the Cal. Code of Civil Procedure. A true and correct copy of the Answer is attached hereto as Exhibit B and is incorporated herein by this reference as if set forth in full.

Appendix F

5. Defendant has not filed, served or received any papers or pleadings in the State Court Action other than those attached hereto as Exhibits A and B.

6. This Notice is timely filed in that it is filed within thirty days of service of the Complaint on Hertz, the only defendant named in the lawsuit. *See* 28 U.S.C. § 1446(b)

7. This action is removable under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), *et seq.* The CAFA provides that the district courts "shall have original jurisdiction" over "a class action in which any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). The Class Action Complaint states that the nature of the action is "a class action" brought by Plaintiffs Friend and Nhieu. Compl. *passim.* Each Plaintiff is a citizen of the State of California.

8. Hertz is a Delaware corporation with its corporate headquarters and principal place of business in the State of New Jersey. Hertz was not and is not a citizen of the State of California (as discussed more fully below). Thus, Plaintiff is a "citizen of a State different from" Hertz under the CAFA. 28 U.S.C. § 1332(d)(2)(A). See Declaration of Krista Memmelaar filed herewith.

Appendix F

9. The CAFA requires that the putative class must have 100 or more class members for the district court to exercise jurisdiction. 28 U.S.C. § 1332(d)(5)(B). In part, Plaintiff seeks to represent a class of all Station Managers and Senior Station Managers (now called Location Managers 1 and 2) in California who purportedly are misclassified as exempt employees over a period of four years prior to the filing of the action (See Compl., ¶ 4) and a sub-class of those of the aforementioned class whose employment was terminated from Hertz (See Compl., Fourth Cause of Action).

10. More than 300 individuals (inclusive of current and former employees) have worked for Hertz as Station managers and Senior Station Managers in California between September 6, 2003 and September 6, 2007, the date the Complaint was filed. Memmelaar Decl. at ¶ 15. Thus, there are far more than the minimum 100 putative class members required by the CAFA for federal jurisdiction. 28 U.S.C. § 1332(d)(5)9B).

11. The CAFA further requires that, for the district court to exercise jurisdiction, the matter in controversy must "exceed the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). When determining the amount in controversy, "the claims of the class members shall be aggregated." 28 U.S.C. § 1332(d)(6).

Appendix F

12. Plaintiffs, on behalf of the putative classes, allege they and the class are entitled to recover (among other things): (1) unpaid wages; (2) restitution; (3) punitive damages; (4) penalties pursuant to California Labor Code Sections 203, etc.; (5) attorneys' fees; and (6) injunctive relief. Compl., Prayer for Relief. The value of each of these items is to be included in the amount in controversy in the State Court Action under the CAFA. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (punitive damages); *Yeroushalmi v. Blockbuster, Inc.*, 2005 WL 2083008, at *4-5 (C.D. Cal. July 11, 2005) (compensatory damages, punitive damages, attorneys' fees, and injunctive relief); *Berry v. American Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1123-1124 (C.D.Cal. 2005) (injunctive relief); *Rippee v. Boston Market Corp.*, 2005 U.S. Dist. LEXIS 39478, at *8 (S.D.Cal. Oct. 14, 2005) (Labor Code penalties).

13. Hertz denies that Plaintiffs and the classes they purport to represent are entitled to any recovery in this action, and by filing this Notice of Removal, Hertz does not waive any defenses that may otherwise be available to it. Without waiving this position, and in light of the allegations of Plaintiffs' Complaint, Hertz' base potential liability is as follows with respect to Plaintiff's causes of action:

a. For missed meal and rest breaks with respect to the class of Station Managers and

Appendix F

Senior Station Managers, and assuming one missed meal break and one missed rest break per week, the potential liability to Hertz is approximately $1,106,152. See Memmelaar Decl. ¶ 19.

b. For "waiting time penalties" under Labor Code § 203 with respect to the California Station Managers and Senior Station Managers terminated during the year prior to the filing of the Complaint, the potential liability to Hertz is approximately $313,834. See Memmelaar Decl. ¶ 20.

c. For the alleged failure to pay overtime to the putative class members, the potential liability is approximately $3,811,229. See Memmelaar Decl. ¶ 18. These amounts total $5,141,215. These amounts do not include attorneys fees sought by Plaintiff; the value of injunctive relief; and punitive damages - all of which are required to be included in determining the amount in controversy under the CAFA, and all of which potentially and collectively total in the hundreds of thousands of dollars. The amount in dispute certainly exceeds the $5,000,000.00 threshold required under the CAFA.

14. Hertz does business and operates rental facilities in 44 of the 50 states. See Memmelaar Decl. at ¶ 3.

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15. The great majority of the employees (roughly 80 percent) that work for Hertz are employed outside the State of California. As of June 30, 2007, Hertz employed approximately 11,230 in the United States. Only approximately 2,299 (or 20.5% of this national total) of this total were employed within the State of California. The next largest states in terms of Hertz employees were: Florida 1,602 (14.3%); Texas 858 (7.6%); Illinois 543 (4.8%); and New York 614 (5.5%). See Memmelaar Decl. at ¶ 7.

16. The great majority (more than 80 percent) of Hertz locations or facilities (i.e., tangible property) are located outside the State of California. As of June 30, 2007, Hertz had approximately 1.606 on-airport and off-airport profit-center rental locations in the U.S. Of those 1.606 locations, approximately 273 were within the State of California. Thus, if "tangible property" is considered to be leased real estate, only about 17.0 percent of Hertz' tangible property is located within California. The next largest states in terms of Hertz profit-center rental locations as of June 30, 2007, the end of the most recent quarter for which Hertz has such information, were: Florida 155 (9.7%); Texas 123 (7.7%); Illinois 83 (5.2%); and New York 83 (5.2%). See Memmelaar Decl., ¶ 6.

17. The great majority of the revenue earned by Hertz is earned outside the State of California. In 2006, the last full year for which such

data is available, only about 18.6 percent of the total annual revenue earned by Hertz operations was earned in the State of California. The State of Florida was next and it was responsible for approximately 11.6 percent of Hertz' total 2006 revenue. See Memmelaar Decl., ¶ 8.

18. The sales of Hertz are in the form of vehicle rentals. The great majority of rentals take place outside of the State of California. In 2006, the last full year for which such data is available, more than 80 percent of Hertz' rental activity occurred outside the State of California. California was first with approximately 18.2 percent of the activity, and Florida was second with approximately 10.7 percent of the activity. See Memmelaar Decl., ¶ 9.

19. There is no single state where a majority of Hertz' business activities take place. Those business activities are instead spread among a wide variety of states. See Memmelaar Decl., ¶ 10. The corporate headquarters for The Hertz Corporation, where much of the overall corporate strategy is developed, is in the State of New Jersey. See Memmelaar Decl. at ¶ 1, 11. A substantial predominance of Hertz' activities do not take place in California. Hence, under the applicable "nerve center" test for determining a corporation's principal place of business, Hertz' principal place of business is the State of New Jersey – and not the State of California. The great majority of Hertz' activities take place outside the State of California.

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20. Defendant Hertz asks that the Court take judicial notice of the U.S. Bureau of the Census population figures for 2005 (est.) for the entire country and these same states. The 2005 population figures are as follows: United States 296,410,404; California 36,132,147 (12.2%); Florida 17,789,864 (6.0%); Texas 22,859,968 (7.7%); Illinois 12,763,371 (4.3%); and New York 19,254,630 (6.5%).

21. Based upon all the foregoing, The Hertz Corporation is not a citizen of the State of California, it is not a "citizen of the State in which the action was originally filed" and therefore the exceptions to removal under the CAFA set forth in 29 U.S.C. §§1332(d)(4)(B) and 1332(d)(3) are inapplicable.

For all of the foregoing reasons, Hertz respectfully submits that the State Court Action is removable to this Court under 28 U.S.C. §§ 1332(d) and 1441(b).

WHEREFORE, Defendant The Hertz Corporation prays that this action stand and remain removed from the Superior Court of the State of California for the County of Alameda to this Court.

Appendix F

Dated: October 11, 2007

THELEN REID BROWN RAYSMAN & STEINER LLP

By: s/Robert A. Dolinko
Robert A. Dolinko
Attorneys for
Defendant
THE HERTZ
CORPORATION

APPENDIX G — DECLARATION OF KRISTA MEMMELAAR IN SUPPORT OF REMOVAL OF ACTION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED OCTOBER 11, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CASE NO. 3:07-CV-05222-MMC

MELINDA FRIEND, ET AL.,

Plaintiffs,

v.

THE HERTZ CORPORATION, ET AL.,

Defendant.

DECLARATION OF KRISTA MEMMELAAR IN SUPPORT OF REMOVAL OF ACTION

I, Krista Memmelaar, hereby declare and state:

1. I am a Manager, Employee Relations employed by The Hertz Corporation ("Hertz"). My office is located at 225 Brae Boulevard, Park Ridge, New Jersey, the corporate headquarters of Hertz and its domestic subsidiaries. I have been employed by

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Hertz for 11 years and I am familiar with Hertz' operations in the United States. In my position, I have access to information and data regarding the staffing, business operations and revenues of Hertz and its domestic subsidiaries.

2. I have read the Complaint in the lawsuit filed by former Managers Melinda Friend and John Nhieu in the Superior court of California, County of Alameda. This declaration is based on my personal knowledge, and if called upon to testify as to the facts set forth in this declaration, I could and would competently testify to them.

3. Hertz either directly, or through its domestic subsidiaries, operates "on-airport" and "off-airport" rental facilities in 44 of the 50 states. Melinda Friend and John Nhieu worked as managers at Hertz' "on-airport" rental facility located at the airport in San Jose, California.

4. Hertz is incorporated in the State of Delaware.

5. This declaration is based on my personal knowledge, and business records kept in the regular course of business. With respect to those business records, the entries are made in a timely manner by people with knowledge of the information, and it is the regular practice of Hertz' business to maintain such records. In my position, I have access to all the corporate information which is included in

this declaration. If called upon to testify as to the facts set forth in this declaration, I could and would competently testify to them.

6. As of June 30, 2007, Hertz had approximately 1,606 on-airport and off-airport profit-center rental locations in the U.S. Of those 1,606 profit-center locations, approximately 273 were within the State of California. Hertz does not purchase property for its rental locations. Thus, if "tangible property" is considered to be leased real estate, only about 17.0 percent of Hertz' tangible property is located within California. The next largest states in terms of Hertz' profit-center rental locations as of June 30, 2007 were: Florida 155 (9.7%); Texas 123 (7.7%); Illinois 83 (5.2%); and New York 83 (5.2%). The second quarter of 2007 is the most recent period for which Hertz has such data available.

7. As of June 30, 2007, approximately 11,230 full-time employees in the United States worked at Hertz' on-airport and off-airport locations. Approximately 2,299 (or 20.5% of this national total) worked at these locations in the State of California. The next largest states in terms of employees were: Florida 1,602 (14.3%); Texas 858 (7.6%); Illinois 543 (4.8%); and New York 614 (5.5%). There has been no meaningful change in the comparative data by state over the past few months.

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8. The total rental revenue earned by all on-airport and off-airport rental operations nationwide in 2006 (the last full year for which data is available) was approximately $4.371 billion. Of this amount, approximately $811 million (or 18.6%) was revenue earned by operations in the State of California. The next largest states in terms of 2006 revenues from on-airport and off-airport rental operations were: Florida $505 million (11.6%); New York $213 million (4.9%); Texas $296 million (6.8%); and Illinois $158 million (3.6%).

9. In terms of rental activity in 2006, the last full year for which data is available, Hertz' on-airport and off-airport locations processed approximately 20,940,000 vehicle transactions (i.e., rentals) nationwide that year. Of this figure, approximately 3,801,000 transactions (or 18.2%) were processed in the State of California. The next largest states in terms of on-airport and off-airport vehicle transactions in 2006 were: Florida 2,245,000 (10.7%); New York 943,000 (4.5%); Texas 1,566,000 (7.5%); and Illinois 873,000 (4.2%).

10. There is no single state where a majority of Hertz' business takes place or revenues are derived. Hertz' business activities are spread among the 44 states where it does business.

11. The leadership of Hertz and its domestic subsidiaries is found at our New Jersey corporate headquarters. The major administrative operations

for Hertz and its domestic subsidiaries are found in Park Ridge, New Jersey and Oklahoma City, Oklahoma. The core executive and administrative functions for Hertz and its domestic subsidiaries are carried out in New Jersey and, to a lesser extent, Oklahoma. Hertz' overall executive and administrative functions are not found in the State of California.

12. For employment purposes, Hertz considers full-time employees to be those who are anticipated to work 40 hours per week or more.

13. Hertz' Corporate Payroll Department is responsible for generating payroll checks, including those for managers working at the on-airport rental locations in California. The Corporate Payroll Department maintains these payroll records in the regular course of business, it is the responsibility of that department to do so, and entries to the payroll system are made by individuals responsible for doing so.

14. The Corporate Payroll Department ran a report reflecting all Station Managers and Senior Station Managers (also respectively referred to as Location Manager 1 and Location Manager 2) employed by Hertz at its on-airport rental operations in California from September 6, 2003 through September 6, 2007, along with a listing of the total number of weeks that they worked (and for which they received paychecks).

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15. The report I received from the Corporate Payroll Department reflected that Hertz employed 342 Station Managers and Senior Station Managers (and their current equivalents at the airport locations, Location Managers 1 and 2) at its locations in California during the period September 6, 2003 through September 6, 2007. Together, they worked a total of 26,421 weeks.

16. The report I received from the Corporate Payroll Department also provided salary data for the 342 Station Managers and Senior Station Managers (Location Managers Levels 1 and 2) in California. During the period September 6, 2003 through September 6, 2007, the average annual base salary earned by these on-airport managers in California was approximately $40,000.

17. The equivalent hourly rate for a manager earning $40,000 a year would be $19.23 per hour (calculated by dividing $40,000 by 2,080 - - [40 hours per week x 52 weeks = 2,080 hours per year]).

18. I understand that Ms. Friend and Mr. Nhieu allege that Hertz did not pay them and other similarly situated employees in California for overtime hours worked. The Complaint, however, does not quantify the amount of unpaid overtime allegedly worked, and Hertz maintains that Ms. Friend, Mr. Nhieu and all other on-airport managers are exempt under the administrative, executive and/or other applicable exemptions and thus they are

not entitled to be paid overtime. Nonetheless, I have employed an estimate that, on average, each Station Manager and Senior Station Manager at Hertz' on-airport rental operations worked five (5) hours of "overtime" per week, at an average rate of $28.85 per hour (which is one and one-half times $19.23, the average hourly rate for all such managers during the last four years, as stated above). This average estimate is based upon my knowledge and information regarding the on-airport rental operations and the hours worked by on-airport Station Managers and Senior Station Managers. If entitled to such payment, each such manager would have earned approximately $144.25 in "overtime" per week. When multiplied by the 26,421 weeks of work by individuals who held the position of Station Manager and Senior Station Manager (as noted above), the potential liability for unpaid "overtime" totals $3,811,229.

19. I understand that Ms. Friend and Mr. Nhieu also claim that they and all other Station Managers and Senior Station Managers were not provided meal and rest periods. Hertz maintains that Ms. Friend, Mr. Nhieu and the managers they claim to represent were exempt employees and thus were not denied any legally required meal or rest periods. Nevertheless, I understand that each putative class member claims that he or she is entitled to recover "one additional hour of pay" at his or her regular rate for each meal period and for each rest period that was not provided. Using the average

regular hourly rate of $19.23 as calculated above, and assuming just one missed meal period and one missed rest period per week, the amount in dispute for this element of Plaintiffs' claim is $1,016,152. This is calculated by taking the number of workweeks worked by the Station Managers and Senior Station Managers in California for the four years prior to the filing of the lawsuit (26,421), multiplying that by one day per week, multiplying that by $19.23 per hour, and multiplying that by two (for alleged missed meal periods and rest periods).

20. I understand that Ms. Friend and Mr. Nhieu also claim that managers were terminated without being paid all wages due and therefore each such class member is owed thirty days waiting time penalties. While disputing this claim, if we assume each manager was paid on average $153.84 per day (8 hours x $19.23 per hour), waiting time penalties would be $4,615.20 per terminated manager. As there are 68 California on-airport Station Managers and Senior Station Managers whose employment terminated in the period September 6, 2006 through September 6, 2007, the amount in dispute for this aspect of Plaintiffs' claims is approximately $313,834.

21. Adding the figures I have calculated above for amounts in dispute, the sum is $5,141,215; well in excess of five million dollars.

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I declare under penalty of perjury under the law of the United States that the foregoing is true and correct. This declaration was executed on October 9, 2007, at Las Vegas, Nevada.

s/Krista Memmelaar
Krista Memmelaar

OPPOSITION BRIEF

128 (5)

Supreme Court, U.S.
FILED
MAY 5 - 2009
OFFICE OF THE CLERK

No. 08-1107

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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JURISDICTION

For the reasons set forth in Section V below, Respondents dispute Petitioner's assertion that this Court has jurisdiction pursuant to 28 U.S.C. § 1254. Rather, pursuant to 28 U.S.C. § 1453, which is expressly applicable to appellate jurisdiction in cases like this one, which are removed pursuant to the Class Action Fairness Act and subsequently remanded, appellate jurisdiction has expired.

INTRODUCTION

The Petition for Certiorari of The Hertz Corporation arises out of a class-action case alleging violations of California law brought solely on behalf of California workers. This action was filed in California Superior Court, removed by Hertz to federal district court, and remanded, on Plaintiffs' Motion, back to California Superior Court. It has been proceeding in California Superior Court since January 2008. The parties have taken numerous depositions and exchanged thousands of pages of documents pursuant to a discovery plan agreed upon by the parties and approved by the Superior Court. After nearly a year and a half of litigation, including significant discovery, depositions and motion practice, Plaintiffs are on schedule to file their Motion for Class Certification in the late summer or early fall of 2009.

While the case has moved steadily toward resolution on the merits, without any allegation or hint of prejudice or bias on behalf of the California Superior Court, Hertz has fought a separate, losing battle in the federal

appeals court against the remand by the district court. Hertz now asks this Court, after a year and a half of concerted litigation, to pluck this case from the purview of California Superior Court.

Hertz's Petition focuses entirely on the issue of whether Hertz's "principal place of business" is California for purposes of diversity jurisdiction. Hertz claims that the Circuit Courts of Appeal are split in their interpretations of this statutory provision.

Review by this Court is unnecessary and inappropriate for several reasons. First, at the same time it fought for removal in this case, Hertz sought remand to California state court in a very similar case involving an overlapping class of plaintiffs pending in federal district court in southern California, and thus may very well be judicially estopped from advancing its arguments in this Court.

Second, Hertz has significantly overstated the perceived split among the Circuits. As Judge Kleinfeld of the Ninth Circuit recently wrote in an opinion on which Hertz relies heavily in its Petition and supplemental briefing, all of the Circuits generally apply the same test to determine a corporation's "principal place of business."

Third, Hertz's desire for an "economical" test for determining a corporation's "principal place of business" may have some superficial appeal, but it does not comport with the intent or structural goals of the diversity jurisdiction statute. The statute's drafters

were concerned with a test that actually ascertains the location of a corporation's business activities; Hertz's proposed "economical" test fails to do that.

Fourth, Hertz has alleged no prejudice as a result of this case being litigated in state court. Hertz is very familiar with California's citizens and courts, and cannot and does not make a showing that it will suffer any of the "local prejudice" that diversity jurisdiction was designed to address.

Fifth, contrary to Hertz's contention, this is not an issue that is "rarely" presented to this Court. Subject matter jurisdiction is always at issue, and may be raised, by a party or *sua sponte*, at any stage of the proceedings. In fact, it may be raised for the first time by this Court. Thus, even if this Court were inclined to examine the standards for diversity jurisdiction, it need not use this flawed and inappropriate case to do so.

Finally, this case does not present an effective vehicle for resolving any alleged "split" among the Circuits regarding the "principal place of business" test because California truly is Hertz's principal place of business. Hertz does fully one-fifth of its business in California—nearly two times more than any other state.

For all the reasons below, Respondents respectfully request that Hertz's Petition be denied.

REASONS FOR DENYING THE PETITION

I. In a similar case, Hertz has specifically requested remand from federal to California court and thus may be judicially estopped from raising the argument here

Hertz omits from its Petition any mention of *Piccirilli v. Hertz*, a similar wage-and-hour class-action case. *Piccirilli* was originally filed in state court and removed by Hertz to the U.S. District Court for the Southern District of California. But when it suited Hertz's interests to be back in state court, Hertz *specifically requested remand* to the California state court. *See Piccirilli v. The Hertz Corp.*, S.D.Cal. Case No. 07 CV 1370 JAH, Joint Motion to Remand Case to State Court (Document No. 30).

Hertz has attempted to hedge in *Piccirilli*, stating that its desire to be in state court in the *Piccirilli* case should have no bearing on its objection to remand in this case. But such posturing does not preclude the effects of judicial estoppel. *See New Hampshire v. Maine*, 532 U.S. 742, 743 (2001) (judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment"). The implications of Hertz's about-face from its position in *Piccirilli* present complications that would hamper, if not moot, this Court's ability to resolve the issue even as framed by Hertz.

II. Hertz's supposed split among the Circuits is greatly exaggerated

Hertz has submitted a supplemental brief to this Court regarding the recent Ninth Circuit case of *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026 (9th Cir. 2009). While the majority opinion in this case is a brief and fairly straightforward application of the "principal place of business" test as described in *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495 (9th Cir. 2001), Judge Kleinfeld's concurring opinion discusses the test in detail.

Judge Kleinfeld concludes that no significant rift exists on this subject:

> Our sister circuits generally apply some combination of the nerve center, the "corporate activities" or place of operations, and the "total activity" tests. Despite varying verbal formulas, their approaches generally amount to about the same thing as *Industrial Tectonics*, *Tosco*, and this separate opinion.

Davis, 557 F.3d at 1033 (Kleinfeld, J., concurring).

Indeed, there is a prevailing "general rule" that "the bulk of corporate activity, as evidenced by the location of daily operating and management activities, governs the choice of a principal place of business." 3B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3625, at 625 (2d ed. 1984); *Danjaq, S.A. v. Pathe Commcations Corp.*, 979 F.2d 772, 776 (9th Cir. 1992); *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092, n.3 (9th Cir. 1990).

Judge Kleinfeld's concurrence accurately portrays that the primary difference among the Circuits is the language of the tests they use and, not, as Hertz contends, a "deep four-way split." *See Davis*, 557 F.3d at 1033 (Kleinfeld, J., concurring).

III. Hertz wishes to jettison the intent of the creators of diversity jurisdiction for mere expediency

Hertz pleads for a diversity determination that is "prompt, economical" and "simple [and] practical[.]" Hertz's Petition at 21-22. Similarly, Judge Kleinfeld calls for a test that is "faster, more certain, and cheaper to apply[.]" *Davis*, 557 F.3d at 1031.

While all of these attributes are laudable, they completely ignore the intent of the drafters of the diversity jurisdiction statutes. The underlying purposes of diversity jurisdiction are not in dispute, but they are most certainly imperiled by Hertz's insistence on a "principal place of business" test that does not actually evaluate a company's principal place of business.

When Congress added the "principal place of business" provision, it did so in an attempt to reduce the evil of a state tribunal being denied the opportunity to apply that state's laws to essentially local corporations. With twenty percent of all of its domestic business in California, Hertz has no basis to complain about being considered a California corporation.

Despite its large presence in California and its failure to identify any sort of tangible prejudice, Hertz

urges this Court to abandon the intent of the framers of diversity jurisdiction in favor of a more "simple" test. But because Hertz can identify no harm, this is neither the litigant, nor the set of facts, that call for a wholesale reinterpretation of the meaning and purposes of diversity jurisdiction. This is especially true because Hertz's forum shopping in the *Piccirilli* case has included a request to remand that case to California court.

IV. Hertz does not even attempt to make a showing that it has been or would be prejudiced by having this case heard in state court

Diversity jurisdiction, as Hertz points out in its Petition, serves several purposes. One such purpose, and the only purpose that could apply in this instance, is to "provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries[.]" S. Rep. 85-1830 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3102. But what Hertz's Petition wholly fails to show is how any such "local court" prejudice either has happened or could happen in this case. To the contrary, Hertz has affirmatively sought the jurisdiction of the California Superior Court in other related litigation when it serves Hertz's interests to do so.[1]

---

[1] In addition, it is well-settled that Congress, in crafting the diversity jurisdiction and remand statutes, willingly risked some incorrect remand decisions in favor of efficient litigation. *See Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993) ("Congress enacted § 1447(d) so that state court

(Cont'd)

Hertz is not an "outsider" subject to the local prejudice contemplated by the framers of the diversity jurisdiction statute. As Hertz admits, it does approximately one-fifth of its business in California. Hertz is a household name, and one that is extremely well-known in California's cities, airports and roadways. As such, allowing Hertz to force this action into state court in fact risks creating the evil that the "principal place of business" requirement was specifically designed to address:

> The statute was designed to prevent assertion, for purposes of diversity jurisdiction, that a corporation is a citizen exclusively of the state in which (perhaps as its sole connection) it obtained its corporate charter, and that it is not a citizen of the state in which it conducts its principal business activities.

(Cont'd)

actions could proceed without delay if federal courts consider proper factors and remand, regardless of the correctness of their jurisdictional decisions."); *Robertson v. Ball*, 534 F.2d 63, 66, n.5 (5th Cir. 1976) ("the general policy of § 1447(d) . . . might be stated thusly: once the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect."); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting) ("Congress' purpose in barring review of all remand orders has always been very clear to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand.")

Egan v. American Airlines, Inc., 324 F.2d 565, 566 (2d Cir. 1963).

Hertz simply does not assert that this case presents a harm needing this Court's remedy.

V. The issue of diversity jurisdiction presented by Hertz's Petition is quite common, and may be reviewed by this Court in any diversity case that comes before it

Contrary to the position taken in Hertz's Petition, the traditional bar on review of granted remand orders does not make this an issue that will "evade" this Court "for many years to come." Hertz's Petition at 20-21. The determination of a corporation's principal place of business is a not unique to the Class Action Fairness Act ("CAFA"), and in fact is applicable to *all* diversity cases, whether removed or initially filed in federal court, and regardless of whether they implicate CAFA. 28 U.S.C. § 1332(c)(1). It is well-settled that questions of subject matter jurisdiction cannot be waived and may be raised at any point in a case, even *sua sponte* by this Court. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (*sua sponte* vacating lower court judgment and dismissing the case for lack of jurisdiction).

Furthermore, because CAFA's provision for appellate review is unique and very limited, the jurisdiction of this court to grant Hertz's petition is in question. CAFA imposes a limited time period for appellate review, after which appellate jurisdiction ceases. 28 U.S.C. § 1453(c)(2)-(4) (providing that decision

must be entered within 60 days of granting the initial petition for review, subject to a 10-day or agreed-upon extension of time, and that if this time period is exceeded the appeal is denied as a matter of law and the case is remanded); *see also* 28 U.S.C. § 1453(c)(1) (providing that, except for the limited rights under § 1453(c)(2)-(4), the general rule regarding non-reviewability of remand orders, 28 U.S.C. § 1447, applies to cases removed under CAFA). In this case, the Ninth Circuit granted Hertz's petition for review on September 8, 2008, and issued its opinion on October 31, 2008, within the time authorized by 28 U.S.C. § 1453. However, as per 28 U.S.C. § 1453, appellate jurisdiction ceased no later than November 17, 2008. Accordingly, there simply is no statutorily authorized basis for further appellate review or federal jurisdiction over this case.

VI. This case is not the proper vehicle for resolving whatever alleged split there may or may not be between the Circuits because Hertz's "principal place of business" is California

Hertz understates the significant portion of its business that takes place in California. Hertz repeatedly states that it has "operations in California commensurate with its population[.]" Hertz's Petition at 16, 19, 20, and 22. But while Hertz does approximately twenty percent of its business in California, California represents only twelve percent of the country's population. Thus, Hertz does significantly more business in California than the state's share of the nation's population would indicate.

With so much of its business in California, Hertz is a corporation that should not be attempting to exploit the "principal place of business" doctrine to carry out its forum-shopping goals. As Hertz's Petition concedes,

> the "principal place of business" provision was added to address "the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the federal courts simply because it has obtained a corporate charter from another state."

Hertz's Petition at 18 (quoting S. Rep. 85-1830 at 3102).

Put simply, Hertz's complaint that its "principal place of business" wrongly has been sited in California is not a compelling one, since Hertz does fully one-fifth of its business in the state. The only harm Hertz can identify is that corporations like it will "los[e] the protections intended by diversity jurisdiction[.]" Hertz's Petition at 19. But because its business is so focused on one state, Hertz simply is *not* the type of litigant for whom the protections of diversity jurisdiction were intended.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Hertz's Petition for a Writ of Certiorari.

Respectfully submitted,

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REPLY BRIEF

129

(6)

Supreme Court, U.S.
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No. 08-1107

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The Hertz Corporation is a wholly owned subsidiary of Hertz Global Holdings, Inc., a publicly traded corporation on the New York Stock Exchange. No publicly traded corporation owns 10% or more of Hertz Global Holdings, Inc.'s common stock.

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S. Rep. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099 7

Respondents' Brief in Opposition ("Respondents' Brief") offers no cogent explanation as to why this case does not provide the Court with a rare opportunity to resolve a threshold jurisdictional question that affects thousands of federal district court cases each year, *i.e.*, the appropriate test for locating a corporation's principal place of business for purposes of determining the existence of diversity jurisdiction. Rather, Respondents make a superficial effort to harmonize the various tests used by the circuits and devote the bulk of their brief to a variety of poorly defined procedural objections. As explained briefly below, not only do these objections lack support in the applicable facts and controlling law, but several of them support granting Hertz' Petition for Writ of Certiorari (the "Petition").

ARGUMENT

I. Respondents' Procedural Objections Lack Merit and Several Heighten the Need for Review

According to Respondents, "pursuant to 28 U.S.C. § 1453 . . . appellate jurisdiction has expired" and this Court lacks jurisdiction to grant Hertz' Petition. *See* Respondents' Brief at 1. However, Section 1453 requires that once a circuit court has granted review of a remand order under the Class Action Fairness Act ("CAFA"), "the court [of appeals] shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed" and if such a final judgment "is not issued before the end of the [60

day] period . . . the appeal shall be denied." 28 U.S.C. § 1453(c)(2), (4). However, CAFA nowhere bars this Court's jurisdiction to review judgments rendered pursuant to an appeal permitted under Section 1453.

In contrast, the statute governing this Court's certiorari jurisdiction provides that cases in the courts of appeals may be reviewed by this Court "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree . . ." 28 U.S.C. § 1254(1). In the instant case, a judgment was rendered by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") within the time permitted by CAFA, and Hertz thereafter timely submitted its Petition with respect to that judgment.

Finally, when Congress provided for circuit court review of remand orders in CAFA cases, and created an exception to the general ban on the review of remand orders established by 28 U.S.C. § 1447(d), it did not include any language depriving this Court of jurisdiction to review such circuit court orders. In contrast, when Congress intends to deprive this Court of appellate jurisdiction, it does so explicitly. *See, e.g.*, 28 U.S.C. § 1452(b) (orders remanding bankruptcy cases are "not reviewable by appeal or otherwise by the court of appeals under [28 U.S.C.] section 158(d), 1291, or 1292 . . . or by the Supreme Court of the United States under [28 U.S.C.] section 1254"). Given that Congress did not include language in 28 U.S.C. § 1453 prohibiting review of judgments rendered in appeals permitted by that

section, this Court should not lightly assume any such prohibition, and Respondents offer no reason for doing so. *See, e.g., Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341, 125 S. Ct. 694, 700 (2005)(this Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest"). Consequently, the Court has jurisdiction to grant this Petition pursuant to 28 U.S.C. § 1254(1).

Respondents next suggest that Hertz "may very well be judicially estopped from advancing its arguments in this Court" because of a joint motion to remand submitted in *Piccirilli v. The Hertz Corporation*, S.D. Cal. Case No. 07-CV-1370-JAH. *See* Respondent's Brief at 4. However, in *Piccirilli*, Hertz was confronted with the following conundrum—whether to submit a proposed class action settlement to a federal court in Southern California, in a case properly removed to that court pursuant to CAFA, despite the Ninth Circuit's intervening holding herein that Hertz was a citizen of California and affirming the remand of the *Friend* class action lawsuit to state court. Rather than seek approval of a class action settlement from a court which might lack jurisdiction, Hertz joined in a motion to remand which specifically described this procedural history, and further provided that it "shall not be deemed to constitute, nor be construed as a waiver of, Hertz' right to again remove this action to federal court in the event . . . the Supreme

Court grants certiorari and reverses the Ninth Circuit's determination with respect to the location of Hertz' principal place of business." *See* Reply Appendix at 4a (*Piccirilli* joint motion to remand) and 7a (order on same).

Hertz never asserted in the joint motion to remand in *Piccirilli* that its principal place of business was California; to the contrary, Hertz affirmatively stated that it was seeking this Court's review and reversal of the Ninth Circuit's determination of that very issue. Likewise, Hertz never asserted that the federal court did not have subject matter jurisdiction over the *Piccirilli* action, but only sought remand to avoid the uncertainty of effecting a class action settlement in a court that might lack jurisdiction. Such facts and reservation of rights clearly are not within the doctrine of judicial estoppel.

Judicial estoppel is an equitable doctrine intended to protect litigants and the courts from the abuses and prejudices that can result from a party's reliance on contradictory assertions. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749-751, 121 S. Ct. 1808, 1814-1815 (2001) (summarizing general purposes of the doctrine and recognizing that the circumstances under which it may be applied are not reducible to general formulation). Among the factors to consider in applying the doctrine are whether a party's later position is "clearly inconsistent" with its prior position, whether judicial acceptance of the later position would create "the perception that either the first or second court was misled", and

"whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-751. None of these factors exist in the instant matter. As noted above, Hertz made no "clearly inconsistent" assertions in the *Piccirilli* joint motion to remand. Nor can it be said that Hertz attempted to mislead the court; to the contrary, by seeking remand, Hertz simply sought to foreclose the possibility that a class action settlement might later be nullified for lack of subject matter jurisdiction. Finally, Hertz obtained no "unfair advantage" nor imposed any "unfair detriment" on other parties through its actions; instead, it gave up the very judicial forum to which it believed it was entitled.

Not only is Respondents' judicial estoppel argument contradicted by the above described circumstances and applicable legal principles, but it actually presents an excellent example of why this Court should grant review. Thus, Hertz was caught between conflicting opinions with respect to its citizenship and faced the prospect that its substantial settlement of a class action lawsuit "may be set at naught because [it] made the wrong guess about jurisdiction." *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1191 (7th Cir. 1986). Absent this Court granting review, and providing definite and accepted principles pursuant to which federal courts can readily and uniformly determine their diversity jurisdiction, other courts and litigants will be confronted with the same conundrum.

Respondents next suggest that review should be denied because substantial discovery has taken place in the state court proceeding. However, Respondents offer no authority in support of this suggestion and as this Court has explained:

> It is suggested . . . that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court. . . . [N]o such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to state court. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction.

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464, 466-467, 67 S. Ct. 798, 799-800 (1947). *See also, Lincoln Property Co. v. Roche*, 546 U.S. 81, 126 S. Ct. 606 (2005) (district court remanded case to state court on August 20, 2004 pursuant to ruling by court of appeals and certiorari granted on February 25, 2005); *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2, 103 S. Ct. 2573, 2575 (1983)(citing *Aetna* and noting failure to obtain stay of circuit court mandate did not defeat this Court's jurisdiction); *Carr v. Zaja*, 283 U.S. 52, 53, 51 S. Ct. 360 (1931)(failure to stay mandate does not defeat Court's jurisdiction).

As an apparent corollary to the foregoing argument, Respondents assert that Hertz has failed to show "how any such 'local court' prejudice either has happened [during the course of the discovery proceedings to date] or could happen in this case [in the future]". Respondents' Brief at 7 - 8. However, Respondents offer no legal support for this assertion and their argument once again serves to highlight the need for this Court to grant review. Initially in this regard, the legislative history for the diversity jurisdiction statute recognizes that "[t]he underlying purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts." S. Rep. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3102. Simply put, such prejudices are assumed to exist and do not require independent proof. Moreover, the suggestion that such proof is required, and that a district court needs to determine whether a particular defendant is somehow the "type of citizen" that diversity jurisdiction was intended to protect, only heightens the need for this court to grant review and determine whether any such showing is required, or how it is to be made.

Finally, Respondents argue that the issue presented by the instant Petition "is quite common and may be reviewed by this Court in any diversity case that comes before it." Respondents' Brief at 9 – 10. In support of this assertion, Respondents rely on the proposition that "subject matter jurisdiction cannot be waived and may be raised at any point in a

case, even *sua sponte* by this Court." *Id.* Not only is this assertion contradicted by the cases cited in Footnote 1 of Respondents' Brief, it is predicated on a legal principle which can have no application in the instant context. Thus, once a removed action is remanded to state court, who do Respondents expect to raise the issue of jurisdiction *sua sponte*? The state court judge in the remanded action? A state court judge has no legal authority to determine, *sua sponte* or otherwise, that a federal court has erred in locating a corporation's principal place of business for purposes of diversity jurisdiction. Likewise, it is axiomatic that a state court judge does not have any legal authority to "reject" a remand on such basis.

With respect to review of a remand order by the federal courts in a typical diversity case, and as explained by this Court:

> an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . . [and] as long as a district court's remand is based on a timely raised defect in removal procedure or on a lack of subject matter jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order under [28 U.S.C. § 1447(d)].

Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-128, 116 S. Ct. 494, 497 (1995).

Simply put, aside from the limited review of remand orders under CAFA, remand orders predicated on a lack of diversity jurisdiction are not reviewable in federal court, a state court judge lacks the authority to reverse such a determination and, absent review by this Court, a jurisdictional issue affecting thousands of federal court cases each year will continue to evade review.

II. Respondents' Substantive Objections Do Not Undermine the Need for Review

According to Respondents, there is no "deep four-way split" among the tests applied by the circuits for locating a corporation's principal place of business for purposes of diversity jurisdiction. However, Respondents make no effort to explain how the test applied by the Seventh Circuit (*i.e.*, nerve center) can be harmonized with the test applied by the Ninth Circuit (*i.e.*, substantial predominance), or how these two tests are not likely to result in corporations being deemed to have more than one principal place of business. *Compare*, *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991)("this court follows the 'nerve center' approach to corporate citizenship: a corporation has a single principal place of business where its executive headquarters are located") with *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990)("nerve center test should be used only when no state contains a substantial predominance of the corporation's business activities")(emphasis supplied). Nor do Respondents explain how the Ninth Circuit's method for applying

its place of operations test can be harmonized with the tests applied by any other circuit, *i.e.*, no circuit, save the Ninth, requires a corporation to make a threshold showing that its operations do not substantially predominate in any single state before a court can consider the location of its nerve center. *See* Petition at 10 – 13; Brief for Amici Curiae Chamber of Commerce of the United States of America, Business Roundtable and American Trucking Associations in Support of Petitioner at 9 – 10. Simply put, Respondents ignore the realities of the present situation and cling to a talismanic belief that "the primary difference among the Circuits is the language of the tests they use . . . ." Respondents' Brief at 6. Contrary to Respondents' vague and superficial assertions, and as amply demonstrated by the authorities cited by Hertz and amici curiae, the split among the circuits is very real and demands review by this Court.

CONCLUSION

As noted by the amici curiae, it has been more than 50 years since Congress amended 28 U.S.C. § 1332 to provide that a corporation is a citizen of the state in which it is incorporated and in which it has its principal place of business, and the circuits are firmly entrenched in their various methods for locating a corporation's principal place of business. Those tests are in conflict and the "prompt, economical and sound administration of justice . . . [requires] definite and finally accepted principles . . . [for determining] the respective jurisdictions of federal and state courts . . . ." *American Fire & Cas.*

Co. v. Finn, 341 U.S. 6, 8, 71 S. Ct. 534, 537 (1951). The instant case presents a unique opportunity, which may not occur again for many years to come, for this Court to provide uniformity with respect to a jurisdictional determination that each year affects thousands of federal district court cases. Therefore, Hertz respectfully submits that its Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

REPLY APPENDIX A — JOINT MOTION TO REMAND CASE TO STATE COURT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA FILED FEBRUARY 5, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 07 CV 1370 JAH

DAVID PICCIRILLI, ET AL.,

Plaintiffs,

v.

THE HERTZ CORPORATION, ET AL.,

Defendants.

JOINT MOTION TO REMAND CASE TO STATE COURT

For the following reasons, the parties, by and through their respective counsel, stipulate to the remand of this action to state court pursuant to the terms set forth below:

1. On June 21, 2007, Plaintiff David Piccirilli, individually and on behalf of others similarly

situated, filed this action in the Superior Court for the County of San Diego, California.

2. On July 26, 2007, Defendant The Hertz Corporation ("Hertz") timely removed the action to this federal District Court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), which provides that district courts "shall have original jurisdiction" over "a class action in which any member of a class of plaintiffs is a citizen of a state different from any defendant." In support of this removal, Hertz submitted a declaration showing that it is a Delaware corporation with its principal place of business in the State of New Jersey.

3. Subsequent to the above-described removal, the United States District Court for the Northern District of California concluded that Hertz' principal place of business was located in California because 17%-20% of its revenues, rental facilities and employees are located in California. On October 30, 2008, the United States Court of Appeals for the Ninth Circuit affirmed that Remand Order. *Friend, et al. v. The Hertz Corporation*, Case No. 08-16963, 2008 WL 4750198 (9th Cir. 2008). The Ninth Circuit thereafter denied en banc review of that determination.

4. On or before March 5, 2009, Hertz will file a petition for certiorari to the United States Supreme Court seeking review of the Ninth Circuit's test for locating a corporation's principal place of business

and reversal of its determination that Hertz' principal place of business is located in California for diversity purposes.

5. Plaintiff and Hertz have reached a tentative settlement of the instant action and desire to avoid any uncertainty with respect to court jurisdiction relative to the preliminary and final approval of that settlement.

6. As a result of the foregoing, the parties stipulate to the remand of this matter to the Superior Court for the County of San Diego, California.

7. The stipulated remand of this matter to state court, shall not be deemed to constitute, nor be construed as a waiver of, Hertz' right to again remove this action to federal court in the event a settlement is not consummated in state court and in the event there occurs a subsequent basis for removal (e.g., Plaintiff adds a federal claim; the United States Supreme Court grants certiorari and reverses the Ninth Circuit's determination with respect to the location of Hertz' principal place of business [*See, e.g., Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 266-268 (5th Cir. 2001) (second removal petition permitted after judgment in unrelated case involving same defendants and similar factual situation and legal conclusions); *Doe v. American Red Cross*, 14 F.3d 196, 198 (3rd Cir. 1993) (successive removal permitted after intervening supreme court decision established

original federal jurisdiction)]; or a legal development renders the action removable).

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the parties hereto:

1. This action is remanded forthwith to the California Superior Court in and for the County of San Diego.

2. The remand of this action is without prejudice to Hertz being permitted to remove this action based upon subsequent developments (e.g., the addition of a federal claim by Plaintiff; the Supreme Court granting certiorari and reversing or modifying the district court's remand in the *Friend* action; or there is a development in applicable law that renders the action removable).

Dated: February 5, 2009

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Reply Appendix A

Dated: February 5, 2009

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REPLY APPENDIX B — ORDER REMANDING CASE TO STATE COURT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA FILED FEBRUARY 5, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 07 CV 1370 JAH

DAVID PICCIRILLI, ET AL.,

Plaintiffs,

v.

THE HERTZ CORPORATION, ET AL.,

Defendants.

ORDER REMANDING CASE TO STATE COURT

For the reasons set forth in the parties' Joint Motion filed on February 5, 2009,

IT IS HEREBY ORDERED:

1. This action is remanded forthwith to the California Superior Court in and for the County of San Diego.

Reply Appendix B

2. The remand of this action is without prejudice to Hertz being permitted to remove this action based upon subsequent developments (e.g., the addition of a federal claim by Plaintiff; the Supreme Court granting certiorari and reversing or modifying the district court's remand in the *Friend* action; or there is a development in applicable law that renders the action removable).

Dated: February 6, 2009 */s/ John A. Houston*
United States District
Judge

AMICUS CURIAE BRIEF

125 (3)

No. 08-1107

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IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CALIFORNIA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 08-1107

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CALIFORNIA RETAILERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The California Retailers Association has represented major retailers doing business throughout the state of California since 1933.[1] The Association's membership consists primarily of supermarkets, drugstores, department stores and general merchandise retailers,

[1] The parties have consented to the filing of this *amicus* brief. Nixon Peabody LLP, a counsel for The Hertz Corporation in *Friend v. Hertz Corporation*, authored this brief in part. *See* Sup. Ct. R. 37.6.

many of whom are incorporated and headquartered outside of California, and do business in multiple states in addition to California. The Association's members operate over 9,000 retail stores, which generate combined annual sales within the state of California exceeding $100 billion.

SUMMARY OF ARGUMENT

In supporting Hertz's Petition for Writ of Certiorari, the California Retailers Association and its members (collectively "CRA") seek to ensure that nationwide corporations are treated fairly and consistently in diversity jurisdiction cases.

The diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1), confirms that a corporation can have only one principal place of business for purposes of diversity jurisdiction. *See also Metropolitan Life Ins. Co. v. Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991). Nevertheless, as described in Hertz's Petition for Writ of Certiorari, at 8-14, the various circuits have adopted different (and conflicting) tests for determining a corporation's principal place of business. These various tests can, and do, lead to divergent outcomes depending merely on the fortuity of where a diversity action is originally filed. For example, a nationwide corporation headquartered in Illinois with significant operations in California will have its principal place of business in Illinois when the Seventh Circuit decides the matter pursuant to the "nerve center" test used in that Circuit. *See id.* The same corporation will have its principal place of business in California when the Ninth Circuit decides the matter pursuant to the "place of operations" test used by that Circuit. *See Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495 (9th Cir. 2001).

Retailers with nationwide operations generally do more business in California than in any other state because there are more people, and more consumers, in California. Consequently, under Ninth Circuit law, most nationwide retailers risk being declared California citizens despite the location of their nationwide headquarters and despite their extensive operations outside of California. There is no basis in the diversity jurisdiction statute to deny nationwide corporations doing business in California the benefits of a federal forum simply because they do more business there than any other single state.

In addition, the Ninth Circuit's "place of operations" or "substantial predominance" test for determining a corporation's principal place of business leads to uncertain results. This uncertainty harms the parties and the courts, especially with respect to diversity class actions filed in or removed to federal court pursuant to the Class Action Fairness Act ("CAFA"). 28 U.S.C. § 1332(d) (2007). The CAFA has greatly expanded the number of diversity class actions heard in federal court. If a federal court's jurisdiction is uncertain, then the time and expense associated with class discovery, case management, class certification, and settlement under the CAFA might all be for naught. A district court or a court of appeals (due to an absent class member's objections to the settlement) may determine at the end of the process that the district court never had jurisdiction in the first place.

Finally, nationwide corporations have legitimate concerns about local prejudice that the diversity statute is intended to prevent. For example, local governments have passed laws limiting "formula retail" stores which are traditionally associated with nationwide corporations. At least one such law has

been struck down under the dormant commerce clause as improperly targeting out-of-state corporations. Yet, the Ninth Circuit in this case concluded that "with its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts." *Friend v. Hertz Corp.*, 297 Fed. App'x, 690, 691 (9th Cir. 2008). This is an improper standard. The federal courts should not assume that a corporation that has "extensive contacts" with a state has no need for the protection of the federal courts.

The CRA supports Hertz's Petition for Writ of Certiorari, requests that the Court reject the Ninth Circuit's test for determining corporate citizenship, and urges the Court to grant the petition to establish a uniform rule or standard for determining a corporation's principal place of business.

ARGUMENT

I. The Inter-Circuit Conflict In Determining A Corporation's Principal Place of Business Frustrates the Purpose of the Diversity Statute

All the circuits agree that a corporation can have but one principal place of business. *E.g., Metropolitan Life*, 929 F.2d at 1223. The diversity statute confirms this: "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1) (emphasis added). Unfortunately, the various circuit courts apply different tests in determining a nationwide corporation's principal place of business, resulting in the distinct possibility that a corporation's citizenship will vary by circuit.

As explained in detail in Hertz's Petition, the tests utilized for determining a corporation's principal place of business differ in significant respects depending on the Circuit. At one end of the spectrum is the Seventh Circuit, which applies "the nerve center" test. Thus, "a corporation has a single principal place of business where its executive headquarters are located." *Metropolitan Life*, 929 F.2d at 1223 (Easterbrook, J.).

At the other end of the spectrum is the Ninth Circuit, which initially applies a "substantial predominance" or "place of operations" test. Thus, if "the corporation's activity in one state [is] 'substantially larger' than the corporation's activity in any other state," the corporation has its principal place of business in that state. *Davis v. HSBC Bank Nev.* (*Davis II*), __ F.3d __; 2009 WL 539934, *1-2 (9th Cir. 2009). Only if no state "substantially predominates" does the Ninth Circuit look to a corporation's nerve center. *Id.*

Most other circuits (but not all) apply some form of the "total activities" test. *E.g.*, *MacGinnitie v. Hobbs Group*, 420 F.3d 1234, 1239 (11th Cir. 2005); *Teal Energy v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004); *Capital Indemnity Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004); *Amoco Rocmount Co. v. Armstrong*, 7 F.3d 909, 914-15 (10th Cir. 1993); *Gafford v. General Elec. Co.*, 997 F.2d 150, 162-63 (6th Cir. 1993). This test purports to provide a framework for determining whether to use the "nerve center" test or a "place of operations" (or "place of activities") test in determining a corporation's principal place of business.

With respect to the Ninth Circuit's "substantial predominance" test, the Circuit has stated that a "substantial predominance" of a corporation's opera-

tions can be considerably less than a majority. *E.g.*, *Davis II*, 2009 WL 539934 at *2. The corporation's presence need only be "substantially larger" in one state than any other single state. *Id.*

California is home to approximately 37 million people, or about 12% of the United States' population. It has substantially more people than Texas (52% more), the next largest state with a population of approximately 24 million. California's gross domestic product is more than 1.8 trillion dollars, or approximately 13% of the United States' gross domestic product. California's economy is substantially greater than that of Texas (58%), the next largest state.[2] California's land mass is larger than any state but Alaska and Texas. Under the Ninth Circuit test, and given its annual contributions to the federal treasury, California would likely be considered the "principal place of business" of the United States, even though the federal government plainly sits in the District of Columbia.

Given the above statistics, it is not at all surprising that nationwide retailers are likely to have greater sales, more locations, and more employees in California than in any other state. And because nationwide corporations may be sued in multiple circuits, the circuits' various tests create a considerable risk that each such corporation will be found to have more than one state as its principal place of business.

For example, according to the U.S. Department of Labor, about 1.6 million people are employed at department stores in the United States. Approximately

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[2] This data is for 2007 (the most recent available). Bureau of Economic Analysis, U.S. Department of Commerce, http://www.bea.gov/regional/gsp/.

14% of these employees (or 224,591) work in California, and the remaining 86% work elsewhere. Texas, the next largest state, holds 6.8% of the nation's department store employees (or 109,281). Accordingly, department stores employ 105% more employees in California than in Texas. The same trend – though to different degrees – applies to other types of retailers, as set forth in Appendix A.

Thus, under the Ninth Circuit's analysis, large retailers – in the aggregate – face a significant risk of being declared California citizens simply because their presence in California is greater than their presence in any other *single* state. The other circuits, in contrast, will almost certainly find that the principal place of business of these large retailers is elsewhere.

For example, Best Buy, which is headquartered in Minnesota, has operations in nearly all 50 states. Eleven percent of its stores, 13% of its sales, and 13% of its employees are in California. Texas is the second largest state, with 10% of Best Buy's stores and 9% of its sales and employees. Thus, Best Buy has 16% more stores, 45% more sales, and 45% more employees in California than in Texas. Based on these facts, a district court (prior to being overruled by the Ninth Circuit), applying Ninth Circuit law concluded that Best Buy has its principal place of business in California. *Davis v. HSBC Bank Nev.* (*Davis I*), 2008 WL 4829880, *3 (C.D. Cal. 2008). The Eighth Circuit would likely disagree, and find instead that Best Buy is a citizen of Minnesota. As explained by Judge Kleinfeld, concurring in *Davis II*: "[w]ere we to accept the district court's conclusion that Best Buy is a California citizen because it does more business there than in Texas, the Eighth Circuit and the district courts in Minnesota, where all of Best Buy's na-

tional management and administration take place, would rightly scoff." 2009 WL 539934 at *12. While the Ninth Circuit overruled the district court in *Davis II*, based on the specific facts, it did not change its test. Thus, the conflict, and problem, remains.

In sum, the inter-circuit conflict for determining a corporation's principal place of business creates a considerable risk that many nationwide corporations will be found to have more than one principal place of business depending on the circuit in which they are sued. This result conflicts with the plain language of the diversity statute.

II. The Ninth Circuit's "Substantial Predominance" Test Renders a District Court's Subject Matter Jurisdiction Over Diversity Class Actions Uncertain

Even absent the conflict among the Circuit Courts of Appeal, the Court should grant Hertz's Petition for Writ of Certiorari. The Ninth Circuit's "substantial predominance" test for determining a corporation's principal place of business is too uncertain to provide meaningful guidance for litigants and the lower courts.

A. Uncertainty Demonstrated In The Instant Case

Prior to the district court's remand order in *Friend v. Hertz Corporation*, two separate district court judges in the Ninth Circuit, considering virtually the same basic facts, concluded that Hertz's principal place of business was *not* in California.[3] If two dis-

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[3] *See Lopez v. Hertz Local Edition, Inc.*, Case No. CV-06-7364 SJO (JTLx) (C.D. Cal.); December 15, 2006 Order To Show Cause; Hertz Amended Notice Of Removal (filed Jan. 3, 2007);

trict court judges, reviewing the same set of facts and applying the same test, can reach a conclusion exactly the opposite of a third district court judge, the legal test plainly is inadequate and fails to provide the parties with any reasonable certainty as to whether federal diversity jurisdiction does or does not exist in a particular case.

B. Uncertainty Demonstrated Between This Case and *Davis*

A comparison of the Ninth Circuit's decision in this case and its decision in *Davis II* also illustrates the uncertainty created by the Ninth Circuit test. In this case, the Ninth Circuit applied the substantial predominance test and concluded that Hertz was a citizen of California because 17% of its rental facilities, 18% of its sales, and 20% of its employees were located there. In *Davis II*, the Ninth Circuit concluded that Best Buy was not a citizen of California when 11% of its stores, 13% of its sales, and 13% of its employees were located there. 2009 WL 539934 at *1. The Ninth Circuit has provided no guideposts or standards that explain why a mere five to seven percent difference in the two nationwide retailers' California operations renders Hertz a citizen of California and Best Buy not.

Similarly, the Ninth Circuit's practice of determining a corporation's principal place of business by examining the corporation's business operations in

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April 11, 2007 Chambers Order; *Charlot v. The Hertz Corp.*, Case No. CV 07-1496-JFW (FFMx) (C.D.Cal.); March 26, 2007 Order To Show Cause; Declaration of Krista Memmelaar In Response To Show Cause Order (filed Apr. 4, 2007); April 6, 2007 Order Discharging The Order To Show Cause. These pleadings are available on the PACER system of the United States District Court for the Central District of California.

the two states with the largest shares of those operations potentially leads to corporations changing their principal place of business from year to year based on relatively minor market adjustments. For example, the Ninth Circuit concluded that Best Buy was *not* a citizen of California in part because it only did 45% more sales in California than in Texas – the next largest state (13% in California; 9% in Texas). Hertz, however, was deemed a citizen of California in part because it generated 60% more revenue in California than in Florida – the next largest state (18.6% in California; 11.6% in Florida).

However, only a *one percentage point shift* in sales or revenue within each of the two largest markets materially alters the "percentage more" calculation relied upon so heavily by the Ninth Circuit. Hertz, for example, would go from having 60% more revenue in California than in Florida to having only 39% more revenue (17.6% in California; 12.6% in Florida) – less than the 45% sales figure relied upon by the Ninth Circuit in determining that Best Buy was not a California citizen. Thus, under the Ninth Circuit's test, Hertz might be a citizen of California one year, then a citizen of New Jersey the next, if its Florida tourism business increases while California's drops. The same dangers hold true for any nationwide retailer located in California. Under the Ninth Circuit test, a modest consumer expansion in one state and an equally modest business contraction in another could lead to a change in a nationwide retailer's principal place of business.

C. Uncertainty With Respect to the CAFA Jurisdiction

This uncertainty could lead to a substantial waste of court and litigation resources, especially with re-

spect to claims brought in or removed to federal court under the CAFA.

Congress passed the CAFA in 2005 in response to the perceived abuse of the class action litigation device in state courts. Pub.L. 109-2 § 2, 119 Stat. 4, (a)(4) (2005). Among its findings, Congress specifically stated that: "State and local courts are . . . sometimes acting in ways that demonstrate a bias against out-of-State defendants. . . ." Pub.L. 109-2, §, 119 Stat. 4, (a)(4)(B) (2005). Congress' express intent was to expand federal court jurisdiction over class actions between parties of different states based upon a concept of "minimal diversity." Thus, the CAFA generally grants the federal district courts original jurisdiction over class actions in which any defendant is a citizen of a state different from any (putative) class member. 28 U.S.C. § 1332(d)(2).

Predictably, the CAFA has resulted in an increase in class actions filed in or removed to federal courts. Prior to enactment of the CAFA, approximately 29 diversity class actions were brought in or removed to federal court each month. After the CAFA's enactment, the number doubled to approximately 58 – or almost 700 a year. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act Of 2005 on Federal Courts: Fourth Interim Report*, Federal Judicial Center, at 6, April 2008, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf. The Ninth Circuit, in particular, has faced an increase in diversity class actions well above the federal court average. Within the Ninth Circuit, there has been a 100% increase in diversity class action cases removed to federal court, and an almost 400% increase in diversity class actions

originally brought in federal court. Lee & Willging at 22, Figure 4.

Like most other civil cases, the vast majority of class actions result in settlements. Oftentimes, a settlement is reached only after the parties and the court have expended enormous time and energy in conducting discovery, managing the litigation, and determining the propriety of class certification. Unlike other cases, however, strangers to a class action with an interest in its outcome (*e.g.*, absent class members) can object to any settlement. One study found that the number of objectors varied, with a median of three objectors per class action settlement. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs & Objectors in Class Action Litigation: Theoretical & Empirical Issues*, 57 Vand. L. Rev. 1529, 1546 (2004).[4]

In many cases, the Ninth Circuit's "substantial predominance" test will result in considerable uncertainty as to whether a diversity class action properly belongs in federal court. A district court (or a court of appeals) can consider subject matter jurisdiction over a case at any time, whether the issue is raised *sua sponte*, by one of the parties, or by an objector. And objectors may have every incentive to raise (or threaten to raise) the jurisdictional issue in an effort to obtain a settlement more favorable to the objectors, or, perhaps, remove the case from the auspices of a particular federal court all together.

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[4] Another study states that someone objects to a class action settlement in slightly more than one half of cases. Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide For Judges,* Federal Judicial Center, at 20 (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$File/ClassGde.pdf.

In short, the uncertainty of the Ninth Circuit's test can easily lead to late-in-the-game attempts at forum shopping and to enormous wastes of judicial resources in the litigation of the CAFA-based class actions (and other complex actions) that are belatedly deemed to have been improvidently filed or removed. To avoid such unnecessarily harmful consequences, the Court should grant review of Hertz's petition and provide litigants and the lower courts with a standard that better assures reasonable certainty as to a district court's jurisdiction over an action.

III. The Federal Diversity Statute and the CAFA Should Be Interpreted to Protect Nationwide Corporations from Local Prejudice

The purpose of diversity jurisdiction is to provide a "federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant." *J.A. Olson Co. v. Winona*, 818 F.2d 401, 404 (5th Cir. 1987). The Ninth Circuit, however, assumes that a nationwide corporation with significant business operations in California "is not the type of litigant that diversity jurisdiction was designed to protect." *Tosco*, 236 F.3d at 502. In this case, the Ninth Circuit specifically stated: "With its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts." 297 Fed. App'x at 691.

In fact, nationwide corporations, even those with significant operations in California (or another state), are very much subject to prejudice as "out-of-staters." And they have a *particular* need for the protections afforded by the federal courts. Such corporations are more likely to be sued (due to their greater presence) than other out-of-state citizens, and are subject to a

considerable danger of local prejudice. As Judge Kleinfeld cogently stated in his concurring opinion in *Davis II*, even if jurors may not have a prejudice against citizens and corporations of other states, "[d]iversity protects against deep pocket justice as one form of prejudice." 2009 WL 539934 at *9.

Concern over local prejudice is particularly warranted in the retail context. Evidence of local prejudice against retailers headquartered in other states comes in a variety of forms, but most obviously in the guise of grass-roots and political efforts to prevent such retailers from entering local communities. "In California alone, nearly a dozen towns and counties have adopted anti-big-box ordinances." Tim Sullivan, High Country News, June 7, 2004, available at 2004 WLNR 15077826.

In addition to well-publicized political efforts demonstrating prejudice against "big box retailers," local governments also have passed laws aimed at national retail chains that typically operate smaller stores. For example, in 2004, San Francisco passed an ordinance limiting "formula retail" stores within the city. The ordinance expressly sets forth that one of San Francisco's concerns about formula retailers is that they are not "local." According to the ordinance, "[m]oney earned by independent businesses is more likely to circulate within the local neighborhood and City economy *than the money earned by formula retail businesses which often have corporate offices and vendors located outside of San Francisco*." S.F., Cal., Planning Code § 703.3(a)(5) (2004) (emphasis added).[5]

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[5] Laws intended to limit chain retail stores or restaurants have been passed by many local governments, particularly in California. *See e.g.*, Arcata, Cal., Ordinance 1333 (June 5,

Some formula retail ordinances have survived challenge under the dormant commerce clause because, although the legislators made discriminatory statements about out-of-state retailers when passing the law, their motives were irrelevant to the court's analysis. *Coronadans Organized for Retail Enhancement v. Coronado*, 2003 WL 21363665, *6 (Cal. App. 2003) (unpublished). Other such ordinances have been struck down because "the ordinance's effective elimination of all new interstate chain retailers has the 'practical effect of . . . discriminating against' interstate commerce." *Island Silver & Spice Inc. v. Islamorado*, 542 F.3d 844, 846-47 (11th Cir. 2008) (quoting *Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)).

These laws (regardless of their constitutionality) show that the prejudice against nationwide corporations with out-of-state headquarters is very real. A nationwide corporation's "extensive California contacts and business activities" does not eliminate this prejudice, nor should it eliminate federal jurisdiction, as the Ninth Circuit suggests. If anything, such contacts potentially increase prejudice as local citizens may erroneously believe that corporations headquartered elsewhere take money and jobs from the local economy and "do not care" about the local population.

In determining a corporation's principal place of business, a proper consideration is which single state's population, government, and courts are *least likely* to be prejudiced against a nationwide corpora-

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2002); Calistoga, Cal., Ordinance 519 (Feb. 6, 1996); Coronado, Cal., Mun. Code § 86.55.360; Pacific Grove, Cal., Mun. Code §23.64.115; San Bautista, Cal., Ordinance 2007-04 (Feb. 20, 2007); Sausalito, Cal., Mun. Code § 10.44.240 (2003); and Solvang, Cal., City Code § 11-12-7(E) (1994).

tion due to that corporation's business activities and corporate presence. A proper consideration is most certainly not, as the Ninth Circuit suggests in this case and *Tosco*, whether a corporation's contacts and business activities are significant enough in a particular state to make local prejudice no more likely there than anywhere else.

CONCLUSION

The inter-circuit conflict concerning a nationwide corporation's principal place of business will lead to such corporations having more than one such place. The Ninth Circuit's test for determining a corporation's principal place of business creates great uncertainty. Nationwide corporations headquartered outside of California – even those with significant contacts within that state – are still subject to the prejudices that diversity jurisdiction is specifically intended to avoid. The California Retailers Association respectfully submits that this Court should grant Hertz's Petition for Writ of Certiorari and should establish a uniform standard for determining a corporation's principal place of business.

Respectfully submitted,

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APPENDIX

APPENDIX

Number Of Employees Working In Certain California Retail Industries As Compared To Next Largest State[6]

Employer Type	Employees Nationwide	Employees In California	Employees In Next Largest State	Percentage Greater Of Employees In California As Compared To Next Largest State
Book Stores	183,531	24,976 (13.6% of total)	13,911 (NY) (7.5% of total)	79%
Clothing Stores	1,142,785	148,061 (12.9% of total)	104,056 (NY) (9.1% of total)	42%
Fast Food Stores	3,464,085	392,966 (11.3% of total)	316,610 (TX) (9.1% of total)	24%
Grocery Stores	2,333,076	273,752 (11.7% of total)	163,182 (FL) (7% of total)	65%

[6] The employment data is for 2007 (the most recent available) and comes from the Bureau of Labor Statistics, U.S. Department of Labor, data search tool, *available at* http://data.bls.gov/PDQ/outside.jsp?survey=en.

AMICUS CURIAE BRIEF

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No. 08-1107

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IN THE

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THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

No. 08-1107

THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE AND AMERICAN TRUCKING ASSOCIATIONS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties.

membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. One of the principal functions of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community.

Business Roundtable is an association of chief executive officers of leading U.S. companies with more than $5 trillion in annual revenues and nearly 10 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all corporate income taxes paid to the federal government. Annually, they return $133 billion in dividends to shareholders and the economy. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research and development spending—more than a third of the total private R&D spending in the U.S.

American Trucking Associations, Inc. ("ATA") is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,500 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States,

including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before this Court and other courts.

Amici and their members have strong interests in this case. All *amici* have members who are, or who lead, corporations with nationwide activities. The statute at issue applies only to corporations, and determines the fundamental issue of diversity jurisdiction according to a corporation's "principal place of business." Yet although the statute directs that there be at most only one principal place of business for a given corporation, the different tests in the circuits result in many companies having more than one, depending on where a lawsuit is filed. The Ninth Circuit's ill-defined and open-ended test also results in many nationwide companies being deemed California corporations merely because of the size of California's population as compared to other states. *Amici* therefore urge the Court to grant certiorari to bring uniformity to a statute that requires it.

SUMMARY OF THE ARGUMENT

There is an intractable split among the circuits regarding the test for determining a corporation's "principal place of business" under 28 U.S.C. § 1332(c)(1). The Seventh Circuit exclusively applies the straightforward "nerve center" test, which looks to the place (usually the corporate headquarters) from which the corporation's activities are directed. The other circuits, by contrast, apply an array of subjective tests that consider, in different ways and to different degrees, the locations of the corporation's operations. As a result of the varied tests, nationwide corporations are determined to have

more than one "principal" place of business, in contravention of the governing statute.

The Ninth Circuit's test, moreover, is unworkable, unpredictable and erroneous. That test has proven incapable of yielding consistent results. And the test often (as in this case) deems a nationwide corporation a citizen of California merely because its California operations—reflecting California's large population—are substantially larger than than those in other states while still comprising only a small minority of its overall activities. *Amici* believe that the Seventh Circuit's "nerve center" test is the correct one, because it effectuates the statutory purposes, including those of the recent Class Action Fairness Act ("CAFA"), and also yields consistent, predictable, and readily determinable results. But whichever test the Court ultimately decides upon, the Court should grant certiorari to bring uniformity to what must be a uniform determination.

Finally, this case is an ideal vehicle for resolving the split in the circuits. The circuits' differing tests have grown firmly entrenched, without any guidance from this Court. And the differences in those tests were dispositive in this case. Because the avenues for appeal of jurisdictional determinations are limited, it may be years, if not decades, before another similar case makes its way to this Court. The Court should act on this opportunity to announce a uniform rule for an important and fundamental jurisdictional issue that potentially affects thousands of cases filed against or by corporations every year.

REASONS FOR GRANTING THE WRIT

I. THE INTRACTABLE SPLITS AMONG THE CIRCUITS PERPETUATE INTOLERABLE UNCERTAINTY WHERE THE STATUTE DEMANDS UNIFORMITY.

In 1958, Congress amended Section 1332 to provide that a corporation is a citizen of both its place of incorporation *and* its principal place of business. *See* Pub. L. No. 85-554, 72 Stat. 415 (1958) (codified at 28 U.S.C. § 1332(c)(1)). Under Section 1332(c)(1), a corporation can have, at most, only one "principal" place of business.[2] The disparate and erratic tests employed by the circuit courts, however, result in more than one principal place of business for a given corporation. After more than 50 years of percolation, the differences in the circuits are firmly entrenched, and the time has come for this Court to bring certainty to the law.

As the First Circuit has recognized, the circuits apply at least "three tests for determining a corporation's principal place of business." *Diaz-Rodriguez* v. *Pep Boys Corp.*, 410 F.3d 56, 60 (1st Cir. 2005). *See* Cameron Fredman, *Developments In The Law: The Class Action Fairness Act of 2005*, 39 Loy. L.A.L. Rev. 1025, 1038 (2006) ("Federal circuits have split on the applicable test to determine principal place of business"); Lindsey D. Saunders, *Determining a Corporation's Principal Place of Business: A Uni-*

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[2] Sometimes a corporation may have no principal place of business, as when it is inactive or its headquarters are outside the United States. *See, e.g.*, *Swiger* v. *Allegheny Energy*, 540 F.3d 179, 188 (3rd Cir. 2008); *Torres* v. *So. Peru Copper Corp.*, 113 F.3d 540, 543-44 (5th Cir. 1997); *Midlantic Nat'l Bank* v. *Hansen*, 48 F.3d 693, 696 (3rd Cir. 1995).

form Approach to Diversity Jurisdiction, 90 Minn. L. Rev. 1475, 1478 (2006) ("the federal courts apply variations and combinations of three different tests to determine a corporation's principal place of business"). And while the tests do not necessarily yield inconsistent results in every case, "their differing emphases mean that, in some cases, *they will point to different locations as the principal place of business.*" *Diaz-Rodriguez*, 410 F.3d at 60 (citation omitted; emphasis added). This disuniformity is intolerable. When courts deem a corporation to have more than one principal place of business, Section 1332(c)(1) is contravened. *See Saunders*, *supra*, at 1487 ("Until all circuit courts apply one test * * * Congress's intent will not be served.").

The differing tests are well-established and will persist absent this Court's intervention. The Seventh Circuit uses the "nerve center" test in all circumstances to determine a corporation's principal place of business. *Metro. Life Ins. Co.* v. *Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) ("a corporation has a single principal place of business where its executive headquarters are located"); *Wis. Knife Works* v. *Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) ("[W]e look for the corporation's brain, and ordinarily find it where the corporation has its headquarters.").

This test can be traced back to one of the first reported decisions on the 1958 amendment. *See Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959). There, the court held that an argument that a corporation's manufacturing operations determined its principal place of business was "misplaced and quite unrealistic." *Id.* Where a corporation has "far-flung" activities in different

states, the court held, "its principal place of business is the *nerve center* from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective." *Id.* (emphasis added).

The Third Circuit, however, has rejected the nerve center test entirely and employs the "center of corporate activities" test, which considers only the location of day-to-day corporate activities. *See CGB Occupational Therapy* v. *RHA Health*, 357 F.3d 375, 381 n.5 (3d Cir. 2004); *Kelly* v. *U.S. Steel Corp.*, 284 F.2d 850, 853-54 (3d Cir. 1960). In *Kelly*, 284 F.2d at 854, the court squarely rejected the plaintiff's "nerve center" argument that a corporation was a citizen of New York, its corporate headquarters, finding that the duty of conducting the "business by way of activities" had been delegated to Pennsylvania.

The First, Second and Fourth circuits, by contrast, apply either the "nerve center" or "place of operations" test on a discretionary, case-by-case basis. *See Diaz-Rodriguez*, 410 F.3d at 61; *R.G. Barry Corp.* v. *Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *Long* v. *Silver*, 248 F.3d 309, 314-15 (4th Cir. 2001); *see also Masterson-Cook* v. *Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989). Where a corporation's activities are decentralized and spread across numerous states, these courts usually apply the nerve center test, but they use the place of operations test when activities are "centralized." Yet there are no clear standards for determining which test applies. *See, e.g., Barry*, 612 F.2d at 655 (although nerve center was elsewhere, corporation was New York citizen because "New

York is the community in which [it] engages in its most extensive contact with the public.").

The Fifth, Sixth, Eighth, Tenth, and Eleventh circuits employ a "total activities" test that attempts to combine the "nerve center" and "place of operations" tests. *See J.A. Olson Co.* v. *City of Winona*, 818 F.2d 401, 409, 411 (5th Cir. 1987); *Gafford* v. *Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993); *Capitol Indem. Corp.* v. *Russellville Steel Co.*, 367 F.3d 831, 835-36 (8th Cir. 2004) ("open-ended" hybrid of the "nerve center" and "place of operations" test); *Gadlin* v. *Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000); *MacGinnitie* v. *Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005). This test employs "a somewhat subjective" analysis to choose between the results of the two tests. *MacGinntie*, 420 F.3d at 1239. When considering a corporation whose operations are far-flung, "the sole nerve center of that corporation is more significant," but the principal place of business is ultimately subject to an analysis of the "nature" of the corporation's activities as a whole. *Olson*, 818 F.2d at 411. Under this vague test, courts are to "take into consideration all relevant factors and [weigh] them in light of the facts of each case." *Gafford*, 997 F.2d at 163.

Departing from all other circuits, the Ninth Circuit uses both the "place of operations" and "nerve center" tests, but applies them in a prescribed order of priority. *See Davis v. HSBC Bank*, __ F.3d __, No. 08-57062, 2009 WL 539934 (9th Cir. Feb. 26, 2009); *Tosco Corp.* v. *Cmtys. for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001); *Indus. Tectonics, Inc.* v. *Aero Alloy*, 912 F.2d 1090, 1092-93 (9th Cir. 1990)). A court may only turn to the "nerve center" test if a defendant fails to meet its burden to prove that "no

state contains a substantial predominance of the corporation's business activities." *Tosco*, 236 F.3d at 500. "Substantial predominance" requires the amount of a corporation's business activity in that one state be "significantly larger" than operations in the state with the second-most operations. *Id.*

Because these tests diverge widely in outcome and predictability and require varying proofs, they guarantee that many nationwide corporations will eventually be deemed to have multiple "principal" places of business. Petitioner Hertz, for example, has its headquarters, or "nerve center," in New Jersey, and the Seventh Circuit will simply hold that Hertz is a citizen of New Jersey on this basis. The Third Circuit would ignore the nerve center if it is not Hertz's center of corporate activity, raising questions whether corporate activities are delegated somewhere outside of New Jersey. The First, Second, and Fourth circuits would make a case-by-case determination as to whether Hertz's principal place of business is in New Jersey or some other state in which it operates. The Fifth, Sixth, Eighth, Tenth and Eleventh Circuits would look at the total activities and use the two tests together. Often these two tests would choose the "nerve center" because of Hertz's far-flung activities, but the analysis depends largely on a court's exercise of discretion. The Ninth Circuit, by contrast, made Hertz a citizen of California, and *never* factored in its New Jersey nerve center, because it found Hertz unable to disprove that its California operations substantially predominated over its Florida operations. *See* Pet. App. 2a.

As a result, Hertz has at least two different "principal" places of business under the circuits'

varying tests—New Jersey and California—and perhaps others. This outcome is prohibited by Section 1332(c)(1), in which Congress made a corporation a citizen of its principal place, not places, of business.

II. THE NINTH CIRCUIT'S TEST IS UNWORKABLE, UNPREDICTABLE AND ERRONEOUS.

A. The Ninth Circuit's Rule Is Incapable Of Consistent Results And Improperly Deems Nationwide Corporations Citizens Of California.

It is particularly crucial that the Ninth Circuit apply the correct test under Section 1332(c)(1), because California's population is substantially larger than that of any other state, which leads nationwide corporations to have commensurately larger operations there. The grant of diversity jurisdiction "has its foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners." *Pease* v. *Peck*, 59 U.S. (18 How.) 595, 599 (1855). Unfortunately, the Ninth Circuit has adopted an elastic and ill-defined test that improperly subjects national corporations with headquarters elsewhere to state courts as "local" California companies, even when their California operations just reflect a larger presence due to California's population size. And even worse, the test has proven incapable of producing consistent results. As a result of the Ninth Circuit's failure to provide clear direction, nationwide corporations cannot predict whether by doing business in California, they will be made California citizens and thus subject to California

state courts when sued by California plaintiffs. Certiorari is thus warranted for this reason as well.

As Judge Kleinfeld recently noted, the Ninth Circuit's vague test "generates excessive unpredictability and encourages expensive litigation to identify the 'principal place of business' for corporations that operate in multiple states." *Davis*, 2009 WL 539934, at *4 (Kleinfeld, J., concurring). In this case, for example, the Ninth Circuit found that Hertz is a citizen of California, rather than the state of its headquarters, New Jersey. Hertz was deemed a California company because its operations in California substantially exceeded those in the next largest state, even though the vast majority of its operations and revenues (around 80%) were attributable to other states. *See* Pet. 7. The court held that its precedent did not require consideration of California's population as a factor in determining Hertz's principal place of business. Pet. App. 3a. *See Ganezer* v. *DirectBuy, Inc.*, No. CV-08-8666-GAF, 2009 WL 363908, *4 (C.D. Cal. Feb. 11, 2009) (noting that Ninth Circuit "squarely rejected" consideration of California's population size in *Hertz*, and remanding case against corporation with 10% of franchises in California, but with headquarters and all 430 employees in Indiana).

Only four months later, however, the Ninth Circuit held in *Davis*, *supra*, that nationwide electronics retailer Best Buy was a citizen of Minnesota, its nerve center, rather than California. The district court had found substantial predominance because California had 15% more Best Buy stores, 40% more employees, and 46% more sales than Texas, the second highest state. *Davis*, 2009 WL 539934, at *2. But the Ninth Circuit found

that "[a]t most, the statistics demonstrate that Best Buy Stores' California retail activities roughly reflect California's larger population." *Id.* at *2. The court's malleable test thus made it possible to decide the two cases differently, despite the companies' similar percentages of operations in California, and with contrary applications of population size as a factor.[3]

The variances in these results arise from the peculiar burden the Ninth Circuit places on a corporation to prove that its activities in California do not "substantially predominate" over those in the next largest state. This requires "a comparison of that corporation's business activity in the state at issue to its business activity in other individual states." *Tosco*, 236 F.3d at 500. Various indeterminate factors are consulted to determine if a given state contains a substantial predominance of corporate activity, including "the location of employees, tangible property, production activities, sources of income, and where sales take place." *Id.*

This method is acutely susceptible to distortion by the effects of California's enormous population, which dwarfs that of any other state.[4] As Judge Kleinfeld explained, "a comparison between the two highest states cannot tell us whether the highest

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[3] It should be noted that one judge (Judge Ikuta) sat on both the *Hertz* and *Davis* panels.

[4] In 2008, California's population was estimated at 36,756,666, or 12.09% of the total U.S. population. *See* U.S. Census Bureau, Annual Estimates of the Resident Population for the United States (www.census.gov/popest/states/tables/NST-EST2008-01.xls). The next largest state, Texas, had an estimated population of 24,326,974, or 8.17% of the total. *Id.* Thus, California's population is more than 50% higher than that of any other state.

state has a 'substantial predominance' because it tells us only how one state compares to another, not whether any state so predominates that it is reasonable to call a multi-state company a citizen of that one state." *Davis*, 2009 WL 539934, at *8 (Kleinfeld, J., concurring). The comparison between the two highest states "tells us nothing about whether the highest state predominates for the entire corporation (which is what matters)" and therefore cannot yield the principal place of business. *Id.* Thus, if a retailer has operations in all states proportional to population, and predominance between the two largest states is the relevant determination, "California would be the 'principal place of business' for virtually every corporation because of its larger population." *Id.* at *7

The erroneous effects of the Ninth Circuit's test are readily apparent. Starbucks Corporation—world famous as a Seattle, Washington-based corporation—was nevertheless found to be a citizen of California under the Ninth Circuit's test. *Mbalati* v. *Starbucks Corp.*, No. CV-07-3267-RFG (C.D. Cal. June 17, 2007). United Airlines has its world headquarters in Chicago and operates all over the nation, but a California district court found that it is a citizen of California. *Ghaderi* v. *United Airlines, Inc.*, 136 F. Supp. 2d 1041 (N.D. Cal. 2001); *Burgos* v. *United Airlines, Inc.*, No. C-00-04717-WHA, 2002 WL 102607, *6 (N.D. Cal. 2002). Wholesaler Costco has its well-known home office in Washington, but a California district court found that it is a citizen of California. *Castaneda* v. *Costco Wholesale Corp.*, No. CV-08-7599-PSG, 2009 WL 81395, *2 n.2 (C.D. Cal. Jan. 9, 2009). *See also Lao* v. *Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1064 (C.D. Cal. 2006)

(furniture company headquartered in Illinois deemed a California citizen after rejecting arguments based on per capita figures). On the other hand, Home Depot was found to be a citizen of Georgia, the location of its headquarters. *Arellano* v. *Home Depot U.S.A., Inc.*, 245 F. Supp. 2d 1102, 1107-1108 (S.D. Cal. 2003).

Despite holding that a nationwide retailer "will not be a citizen of California merely because its operations in California cater to California's larger population," *Davis*, 2009 WL 539934 at *3, the recent *Davis* decision failed to deliver a directive to lower courts that will ensure consistent decisions. The court does "not require that courts apply a per capita approach to determining a corporation's principal place of business *in every case*." *Id.* (emphasis added). And "[t]he substantial predominance test does *not* require that a majority of corporate operations occur in a single state." *Id.* at *2 (emphasis added). While California's large population figures into the analysis, there is no explanation of the proof required, and the court declined to adopt any "hard and fast rule or percentage by which the operations in one state must exceed those in other states." *Id.* Consequently, nationwide corporations continue to face uncertainty as to their citizenship if they conduct operations in California commensurate with California's large population and giant economy.

The vagueness of the Ninth Circuit's rule thus "generates expensive, unpredictable, and pointless litigation about corporate citizenship, likely to lead to intercircuit conflicts about where national business are citizens." *Id.* at *12 (Kleinfeld, concurring). To disprove allegations of "substantial

predominance," the court requires a quantitative and comparative analysis of the defendants' business activities across various states under each of six factors. *See Tosco*, 236 F.3d at 501-02; *Indus. Tectonics*, 912 F.2d at 1194. But, there is no "map or formula" to identify with any certainty when a corporation's activities are "significantly larger" than those in other states. *Ghaderi*, 136 F. Supp. 2d at 1047. Rather, courts exercise "situation specific judgment" after "taking into account each of the many pertinent circumstances as they present themselves uniquely in each litigated setting." *Id.* The Ninth Circuit also adds the ponderous requirement that courts "take into consideration both the nature of the corporation's business activities and the purposes of the corporate citizenship statute," but without explaining how to apply those factors. *Davis*, 2009 WL 539934 at *2. "Litigation is more than burdensome enough without adding a trial to decide where to have the trial." *Id.* at *10 (Kleinfeld, J., concurring). Yet the Ninth Circuit, like other circuits employing similarly indeterminate factors, guarantees burdensome litigation merely to determine jurisdiction.

These indeterminate guidelines also require corporations to hit a moving target to meet their burden of proof. Judge Kleinfeld noted in *Davis* that if a mere (as opposed to substantial) "predominance" test sufficed, "a corporation's principal place of business might change from year to year, or month to month, based on the routine vicissitudes of commerce." *Id.* But even under a "substantial predominance" test, corporations' citizenship could often change. Particularly in times of economic shift and downsizing, operations may change rapidly,

shifting the principal place of business as detected by an operations test on a monthly or yearly basis in response to market forces or regulation. By contrast, as noted below, the "nerve center" test maintains stability and predictability while still recognizing the state that defines a corporation's public identity.

The panel majority in *Davis* noted that "[w]ere we writing on a clean slate, we would find much in favor of the rule suggested by [Judge Kleinfeld's] concurrence. But we see ourselves as bound by the holding in *Tosco*." *Id.* at *1 n.3. By contrast, this Court is writing on an entirely clean slate, having never addressed the meaning of Section 1332(c)(1) in the half-century since its amendment. The Court should not pass up this opportunity to bring uniformity and certainty to this important area of the law.

B. The Court Should Adopt The "Nerve Center" Test.

Regardless of what test is eventually adopted, the Court should grant certiorari to restore uniformity to a statute that depends on it. But the statutory purpose, as well as the interests of uniformity and predictability, are best served by the "nerve center" test employed by the Seventh Circuit.

The Seventh Circuit rightly prizes the nerve center test for its simplicity and predictability. "[P]arties ought to know definitely what court they belong in, and not face the prospect that their litigation may be set at naught because they made a wrong guess about jurisdiction." *Dimmitt & Owens Fin., Inc.* v. *United States*, 787 F.2d 1186, 1191 (7th Cir. 1986). "Some courts use a vaguer standard * * * we prefer the simpler test. Jurisdiction ought to be readily determinable." *Wis. Knife Works*, 781 F.2d at

1282. The ready determination of diversity jurisdiction in the Seventh Circuit favorably impacts litigation practice, by establishing clarity and efficiency. Unlike the other circuits' tests, few factual disputes arise under the nerve center test, and they are generally easy to resolve.[5]

The other circuits' tests, by contrast, attribute significance to the ever-changing operations of corporations by making those operations determinative of the principal place of business in many cases. Given that Section 1332(c)(1) permits only *one* principal place of business, the hazards of this approach are evident. Unlike the deliberate choice of a corporate headquarters, the operations of a corporation must constantly change and respond to the vagaries of markets and demographics, and may move in and out of states on a year-by-year, or even month-by-month, basis.

The nerve center test best effectuates Congress's intent to deny diversity jurisdiction only to those corporations sued in their "home" states. The 1958 amendment was intended to eliminate from the protections of diversity jurisdiction "those corporations doing a local business with a foreign charter." S. Rep. 85-1830, at 3102. But Congress intended

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[5] The "nerve center" test ably overcomes the situation where a corporate headquarters may only be nominal and is not really the "directing intelligence" of a corporation. *See Wis. Knife Works*, 781 F.2d at 1282-83; *Ace Rent-A-Car* v. *Empire Fire & Marine Ins. Co.*, 580 F. Supp. 2d 678, 687-88 (N.D. Ill. 2008) (holding, despite company president's assertion that Illinois was the principal place of business because his office was there, that Indiana was nerve center from where payments, communications and other governance was made); *Bond* v. *Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 913 (S.D. Ind. 2008) (discerning nerve center from among three candidates).

that the amendment would "not eliminate [from diversity jurisdiction] those corporations which do business over a large number of States, such as the railroads, insurance companies and other corporations whose businesses are not localized in one particular State." *Id.*

While its goal was to reduce the number of diversity cases, Congress identified the particular "evil" it sought to cure: the limitation of corporate citizenship only to the state of incorporation, which "gives the privilege of a choice of courts to a local corporation simply because it has a charter from another State, an advantage which another local corporation that obtained its charter in the home State does not have." *Id.* at 3101-02. Thus, Congress targeted the removal of diversity jurisdiction only at those cases where a "local" corporation sought to bypass state courts in its "home State."

The "nerve center" test best serves these purposes, particularly where (as here) no one state accounts for a majority of a corporation's activities. Diversity jurisdiction shields corporations from hostility and prejudice against "foreigners" or "outsiders" in a state forum, and promotes interstate commerce by allowing corporations to do business outside their home states free from that perceived bias.[6] Where a corporation is in its "home state,"

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[6] *See Burford* v. *Sun Oil Co.*, 319 U.S. 315, 326 (1943) (Frankfurter, J., dissenting) ("It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of the state court and yet not be sufficiently apparent to be made the basis of a federal claim."); *see also Davis*, 2009 WL 539934 at *9 (Kleinfeld, J., concurring) ("Jurors may have no prejudice at all against citizens and corporations of other states, but still have a financial incentive to import their money" especially

Congress deemed such protections unnecessary. But a corporation's home state should not be decided based on an accountant's post hoc statistical comparison; it should be the state the corporation calls home. For example, the home state of Starbucks—where it is least likely to experience outsider bias—is plainly Washington, even if Californians may consume proportionately more coffee than people in other states.

The two instances in which Congress has deprived corporations of diversity jurisdiction—the state of incorporation and the "principal place of business"—are both the products of choice, not imposition. The choice of a state of incorporation is typically an early and deliberate decision to avail the corporation of particular state laws. In fairness, the corporation could be said to agree to be amenable to the courts in the state where it incorporates.

The "principal place of business" should reflect the same underlying policies. A corporation makes a conscious decision about where to place its headquarters, or "nerve center." This is a signature decision that reflects a corporation's identity. The location of the "nerve center" may be a product of the corporation's founding and carry all the history and meaning associated with that birth. Or it might reflect a subsequent symbolic change in location. Regardless, it is the center of a corporation's out-

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"when the corporate pockets are deep and the loss will not affect local employment"). As scholars have noted, the Framers were also concerned that state courts might discriminate against interstate businesses and commercial activities, and thus viewed diversity jurisdiction as a means of ensuring the protection of interstate commerce. *See generally* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 22-28 (1948).

reach to the world, and the place where—regardless of how far-flung the corporation's activities—people know to find it. It is this place, and not the unpredictable and ever-changing outcome of a statistical analysis, where the corporation has its "home" and where it is least in need of the protections of diversity jurisdiction.

These concerns are not just theoretical. The indeterminate tests applied by other circuits encourage forum-shopping by home-state plaintiffs seeking to subject an outsider corporation to state court jurisdiction. *See* Saunders, *supra*, at 1475 ("Nonuniformity encourages forum shopping at the federal level, breeds uncertainty, and, in many cases, serves to thwart Congress's intent to limit federal jurisdiction."). That is because "[t]he savvy plaintiff's attorney will attempt to sue the corporation in the circuit where the test used will favor the plaintiff's position," which "provides no stability or predictability for those corporate parties whose business activities make them prone to suit in more than one circuit." *Id.* at 1488.

Moreover, as a result of CAFA, "[t]here are now more opportunities for plaintiffs, defendants, and their attorneys to shop around for the best forum, class of plaintiffs, or choice of parties to sue." *Id.* at 1475-76; *see* 28 U.S.C. § 1332(d). In CAFA, Congress determined that interstate class actions properly belong in federal court, and sought to make it harder for "plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. 109-14 (2005), at 5. In particular, CAFA aimed to avoid forum-shopping and judge-shopping. *See* 151 Cong. Rec. S999 (daily ed. Feb. 7, 2005) (purpose of CAFA was "to prevent judge shopping to States and even

counties where courts and judges have a prejudicial predisposition on cases.") (statement of Sen. Spector).

Although CAFA allows large interstate class actions to be brought in, or removed to, federal court upon a showing of only "minimum" (rather than complete) diversity, the statute also contains important exceptions for "home-state" and "local controversies," *see* 28 U.S.C. § 1332(d)(4)(A), (B), that make a corporation's citizenship crucial. For example, the "local controversy exception" requires a class action to stay in state court if at least two-thirds of the plaintiffs are from the state where the action was originally filed, and a defendant whose conduct forms a "significant" basis for claims and relief is a citizen of the state. *See* 28 U.S.C. § 1332(d)(4)(A). As noted in the legislative history, "this is a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole." S. Rep. 109-14, at 39. It was intended to cover only "a truly local controversy—a controversy that uniquely affects a particular locality to the exclusion of all others." *Id.*

Making corporations citizens of states based merely on the presence of operations or activities—which are unlikely to form the bond that creates a "truly local controversy"—contorts CAFA's exception, and thrusts open the kind of "jurisdictional loophole" that Congress intended to prevent. CAFA thus increases the opportunities and incentives for plaintiffs in interstate class actions to file suit in a jurisdiction—particularly California—located in a circuit that is more likely to deny a federal forum to a nationwide corporation. *See* Saunders, *supra*, at 1491 ("[P]laintiffs who have a choice of defendants will engage in 'defendant-shopping.' They will sue

the corporation whose principal place of business under the relevant circuit test will be the state in which the plaintiffs are also citizens.").

Accordingly, the "nerve center" test is the most appropriate test for determining a corporation's principal place of business. But regardless of the proper test, the Court should grant certiorari to bring certainty and uniformity to the law.

III. THIS CASE PRESENTS A RARE OPPORTUNITY FOR THIS COURT TO CLARIFY AN IMPORTANT THRESHOLD JURISDICTIONAL ISSUE.

As noted, there are many ways for plaintiffs to exploit the split among the circuits in the test for determining a corporation's principal place of business. By contrast, corporations' remedies to bring uniformity to the law lie only in this Court, and are few and far between. Because remand orders are almost never appealable, *see* 28 U.S.C. § 1447(d), an erroneous determination that a corporation is a citizen of the forum state will rarely be reviewed.[7]

Remand orders under CAFA are appealable in certain instances, but their appealability is subject to the unfettered discretion of the courts of appeals. *See* 28 U.S.C. § 1453. Thus, given that almost all circuits' tests have been firmly entrenched for years if not decades, this provision is unlikely to greatly increase the opportunities for this Court's review. Indeed, even in this case, the Ninth Circuit initially denied permission to appeal, but then reversed

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[7] If the plaintiff has affirmatively invoked diversity jurisdiction, a dismissal for lack of jurisdiction would be appealable. But in suits involving corporations, the defendant is ordinarily the party invoking the federal forum.

course only after Hertz moved for reconsideration. *See* Pet. App. 12a.

This case, moreover, is an ideal vehicle for resolving the issue because the difference between the Ninth Circuit's test and the "nerve center" test was the dispositive factor in denying diversity jurisdiction. Under the Seventh Circuit's test, Hertz would be a citizen of New Jersey and thus amenable to federal jurisdiction in California. This is not true in every case. For example, the differences in the circuits' tests did not ultimately affect the recent *Davis* decision, which would have been decided the same way under the Seventh Circuit's test. And although the Ninth Circuit chose to apply its rule in this case in an unpublished decision, the court has unequivocally set forth that rule in a series of published precedential opinions. *See Davis*, 2009 WL 539934; *Tosco*, 236 F.3d at 500; *Indus. Tectonics*, 912 F.2d at 1092-93.

The circuits have had disparate tests for decades, with no indication that they will resolve the disparity on their own. And the differences in the tests were dispositive here. There is therefore no need for any further "percolation" in the Ninth, or any other, circuit. It could be years before the Court is presented with another opportunity to resolve a threshold jurisdictional issue that affects thousands of cases every year. In the interim, corporations will remain subject to having two or more principal places of business, in direct contravention of Section 1332(c)(1). The time has come for this Court to definitively resolve the issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the judgment below.

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PETITIONER'S BRIEF

135

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IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, a court can disregard the location of a nationwide corporation's headquarters—*i.e.*, its nerve center.

PARTIES TO THE PROCEEDING

Petitioner is The Hertz Corporation, defendant-appellant below.

Respondents are Melinda Friend and John Nhieu, plaintiffs-appellees below. Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified.

RULE 29.6 DISCLOSURE

The Hertz Corporation is a wholly owned subsidiary of Hertz Global Holdings, Inc., a publicly traded corporation on the New York Stock Exchange. No publicly traded corporation owns 10% or more of Hertz Global Holdings, Inc.'s common stock.

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IN THE

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THE HERTZ CORPORATION,
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MELINDA FRIEND, ET AL.,
Respondents.

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the court of appeals is unpublished, but is available at 297 F. App'x 690, and is reprinted at Pet. App. 1a-3a. The order denying a petition for rehearing en banc is unreported, and is reprinted at Pet. App. 15a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(a), (c). The court of appeals had jurisdiction under 28 U.S.C. §§ 1291, 1453(c). The judgment of the court of appeals was entered on October 30, 2008. Pet. App. 1a. A petition for rehearing en banc was denied on December 5, 2008. Pet. App. 15a. The petition for a writ of certiorari was filed on March 2, 2009, and granted on June 8, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1332(c)(1) of Title 28 provides, in pertinent part, that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

STATEMENT OF THE CASE

A. Statutory Background

1. Article III of the Constitution provides, as relevant here, that the "judicial power [of the United States] shall extend to all cases, in law and equity . . . between citizens of different states." U.S. Const. art. III, § 2. In the First Judiciary Act, Congress provided federal courts with jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Act of Sept. 24, 1789, § 11, 1 Stat. 78. Both the Article III grant of diversity jurisdiction and the diversity statute reflected concerns about the administration of justice in state courts. *See, e.g.*, John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 11 & n.49 (1948) (noting that debates over the Act revealed the "basic sentiment that the state courts were untrustworthy"). Echoing those concerns, the "commercial interests of the country" were "reluctant to expose themselves to the hazards of litigation before" state courts. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 498 (1928).

Initially, this Court read the diversity statute to exclude corporations, ruling that a corporation was not itself a citizen of any State. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). Subsequently, the Court held that a corporation should be treated as a citizen of the State in which it is incorporated, by "indulg[ing] in the fiction that, although a corporation was not itself a citizen for diversity purposes, its shareholders would conclusively be presumed citizens of the incorporating State." *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145, 147-48 (1965) (citing *Marshall v. Balt. & Ohio R.R.*, 57 U.S. (16 How.) 314 (1854)).

2. In 1958, Congress amended the rules governing corporate citizenship. Congress considered various proposals to curtail substantially the access of corporations to federal court, including by denying corporations citizenship for diversity purposes altogether, or by deeming a corporation a citizen of any state in which it does business. *See Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., at 35-36 (1957) (hereinafter "House Judiciary Hearings"). Congress rejected those proposals after being informed that corporations continued to rely on access to federal court "in States remote from their headquarters," because of the perceived potential for local bias in non-headquarters States. *Id.*

Congress instead elected to address a particular concern: the "evil" by which "a local business" could forgo an in-state charter and incorporate in a different State in order to avoid being sued in the courts of the State where it carried on all its business. S. Rep. No. 1830, 85th Cong. (1958), *reprinted in* 2

U.S.C.C.A.N. 3099, 3101-02 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)) (hereinafter "S. Rep. No. 1830"). To address that concern, the Federal Judicial Conference, Committee on Jurisdiction and Venue, initially suggested that Congress deem a corporation a citizen of any State from which it derives "more than half of its gross income." House Judiciary Hearings at 14; Report of the Committee on Jurisdiction and Venue (March 12, 1951) (hereinafter "Judicial Conference March Report"), *reprinted in* S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3120. Upon reconsideration, the Conference instead suggested that Congress make a corporation a citizen of the State in which its "principal place of business" is located. House Judiciary Hearings at 25. The Conference representative explained that, whereas the gross-income test "would require evidence" and "would be difficult to apply," the "principal place of business" test offered a "simpler and more practical formula." *Id.* at 36; Report of the Committee on Jurisdiction and Venue (Sept. 24, 1951) (hereinafter "Judicial Conference September Report"), *reprinted in* S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3132.

The Conference borrowed the "principal place of business" formulation from the text of the Bankruptcy Act of 1898 (then codified at 11 U.S.C. § 11). The Conference representative explained to Congress that courts applying the phrase in that context had generally concluded that the principal place of business of a corporation with multi-state interests is where "its officers carry on its day-to-day business, where its accounts are kept, where its payments are made"—*i.e.*, "the actual place where its business op-

erations are coordinated, directed, and carried out," rather than where "it may have a plant." House Judiciary Hearings at 37. Congress accordingly was informed that the "principal place of business" test would "be simple in application." Letter from Elmore Whitehurst, Acting Director of the Administrative Office of the U.S. Courts, to the Honorable Emanuel Celler, Chairman, House Committee on the Judiciary (Mar. 26, 1957), *reprinted in* S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3107 (hereinafter "Letter to House Judiciary Committee"). Congress adopted that proposal, amending § 1332 to provide that a corporation shall "be deemed to be a citizen" not only of "any State by which it has been incorporated," but also "of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1).

3. In 2005, Congress again amended § 1332 as part of the Class Action Fairness Act (CAFA), expanding the availability of a federal forum to class-action defendants. The amendment provides that "[t]he district courts shall have original [and removal] jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs," and "*any* member of a class of plaintiffs is a citizen of a State different from *any* defendant." 28 U.S.C. § 1332(d)(2)(A) (emphasis added). In substantially broadening the statutory grant of diversity jurisdiction, Congress acted in response to a perception that some state courts, including certain courts in California, had been lax in their application of the requirements for class action suits. *See* S. Rep. No. 109-14 at 17 & n.63, 19 & nn.77, 78 (2005) (hereinafter "S. Rep. No. 109-14").

B. Factual and Procedural Background

1. Petitioner is an international car rental company incorporated in Delaware. Petitioner maintains its headquarters at 225 Brae Boulevard, Park Ridge, New Jersey, and its executive leadership is located at its headquarters. Pet. App. 26a ¶ 1, 29a ¶ 11. Petitioner operates rental facilities in 44 of the 50 States. *Id.* at 30a ¶ 3.

2. On September 6, 2007, respondents filed a putative class action against petitioner in California state court, seeking damages for alleged violations of California's wage and hour laws. *See* Pet. App. 17a, 20a. On October 11, 2007, relying on the removal provisions of CAFA, 28 U.S.C. §§ 1332(d), 1453(b), petitioner timely removed the action to the United States District Court for the Northern District of California on the basis of diversity jurisdiction. Pet. App. 16a, 25a. Petitioner accompanied its notice of removal with a sworn declaration from a corporate official stating that petitioner was incorporated in Delaware and that it maintains its corporate headquarters at 225 Brae Boulevard, Park Ridge, New Jersey. *See id.* at 26a-34a. The declaration observed that petitioner's "leadership . . . is found" at its headquarters site, and its "core executive and administrative functions . . . are carried out" there. *Id.* at 29a-30a. Petitioner alleged in its notice of removal that each plaintiff is a citizen of California, and that it is a citizen of Delaware, its State of incorporation, and New Jersey, where its principal place of business is located. *Id.* at 5a.

On November 27, 2007, respondents filed a motion to remand the case. Pet. App. 4a. Respondents did not dispute the location of petitioner's headquar-

ters. Respondents nonetheless argued that petitioner was a citizen of California rather than New Jersey, and that there was thus no diversity of citizenship sufficient to confer federal jurisdiction. *Id.* at 5a.

On January 15, 2008, the district court granted respondents' motion. The court applied the Ninth Circuit's "substantial predominance" (or "place of operations") test for determining a corporation's principal place of business. Under that framework, if a corporation's "business activity [in one State] 'is significantly larger than any other state in which the corporation conducts business,'" that State "'is the corporation's principal place of business.'" Pet. App. 6a (quoting *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 500-02 (9th Cir. 2001)). In comparing the activities in different States, the Ninth Circuit instructs courts to consider "'a number of factors,' including 'the location of employees, tangible property, production activities, sources of income, and where sales take place.'" *Id.* at 7a (quoting *Tosco*, 236 F.3d at 497, 500-02). If, after considering those factors, no State has a "substantial predominance" of business activity, the court locates the corporation's principal place of business in the State "where the majority of its executive and administrative functions are performed." *Id.* (quoting *Tosco*, 236 F.3d at 500).

Applying that framework, the district court concluded that, with respect to "the location of [petitioner's] employees, tangible property, source of income, and . . . sales (rentals)," the "plurality of activity occurs in California," with "the next greatest amount of activity . . . in Florida." Pet. App. 8a. The

court relied on the following facts in reaching that conclusion:

(i) "2299 of [petitioner's] employees work in California (20.5% of its employees), compared to 1602 employees in Florida (14.3% of its employees)";

(ii) "273 of [petitioner's] 'profit-center rental locations' are located in California (17% of its tangible property), as compared to 155 such locations in Florida (9.7% of its tangible property)";

(iii) "in the last year for which information is available, [petitioner] earned $811 million from its operations in California (18.6% of its earned revenue), as compared to $505 million in Florida (11.6% of its earned revenue)"; and

(iv) "in the last year for which information is available, [petitioner] 'processed' 3,801,000 rentals in California (18.2% of its rentals), as compared to 2,245,000 rentals in Florida (10.7% of its rentals)." Pet. App. 8a.

After finding "the differential between the amount of those activities" in California and Florida to be "significant," the district court held that California "is [petitioner's] principal place of business." Pet. App. 9a (citing, *inter alia*, *Ghaderi v. United Airlines, Inc.*, 136 F. Supp. 2d 1041, 1047-48 (N.D. Cal. 2001) (applying framework to conclude that United Airlines' principal place of business is California)). The court denied petitioner's request to "take judicial notice of the fact that California's population is larger than that of Florida," or to adjust the figures for each State "to compensate for differences in population." *Id.* at 10a.

3. Petitioner filed a petition for permission to appeal the district court's remand order pursuant to 28 U.S.C. § 1453(c), and the court of appeals ultimately granted the petition. Pet. App. 13a.

On October 30, 2008, the court of appeals affirmed the district court's order remanding the case, concluding that the district court "correctly applied the 'place of operations' test to determine [petitioner's] principal place of business." Pet. App. 2a. The court of appeals concluded that petitioner's "relevant business activities are 'significantly larger' in California than in the next largest state, Florida," and that California therefore "'contains a substantial predominance' of Hertz's operations." *Id.* (quoting *Tosco*, 236 F.3d at 500). The court rejected petitioner's argument that a court "must consider the comparative population of [the] states in which a corporation operates," concluding that neither its prior decisions "[n]or . . . policy concerns mandate the application of a per capita calculation." *Id.* at 3a. Because the court believed that petitioner's operations in California "substantially predomina[ted]" over its operations in Florida, the court held that "California is [petitioner's] principal place of business." *Id.* at 2a-3a.

4. After its decision in this case, the Ninth Circuit issued another decision addressing the determination of a corporation's principal place of business for diversity purposes. *Davis v. HSBC Bank Nev., N.A.*, 557 F.3d 1026 (9th Cir. 2009). Noting that it was not writing on a "clean slate," *id.* at 1028 n.3, the court in *Davis* reaffirmed the basic framework it applied in this case, except that it considered the defendant corporation's business activity in chosen

states on a per capita basis. *See id.* at 1028-30 & n.4. The court explained that, "[i]f a corporation may be deemed a citizen of California on th[e] basis" of "activities [that] roughly reflect California's larger population . . . nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes." *Id.* at 1029-30. While the court recognized that "[s]uch a result is untenable," it nonetheless refused to "require that courts apply a per capita approach in every case." *Id.* at 1030.

Judge Kleinfeld concurred in the judgment. He explained that the majority's approach "generates excessive unpredictability and encourages expensive litigation to identify the 'principal place of business' for corporations." *Id.* at 1031 (Kleinfeld, J., concurring in judgment).

SUMMARY OF ARGUMENT

For purposes of federal diversity jurisdiction, a corporation is a citizen of, *inter alia,* "the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). Under the ordinary meaning of those terms, a corporation is a citizen of the State in which it maintains its most influential or important site—its corporate headquarters. That straightforward rule not only follows directly from the statutory text, but it also accords with the strong interest in establishing clear and consistent jurisdictional standards; with the principles for determining State citizenship in related contexts; and with Congress's purposes in enacting the "principal place of business" criterion.

The Ninth Circuit fundamentally misconstrued the terms of § 1332(c) in two significant respects. First, while the statutory language speaks in terms of the particular "place of business" within a State that constitutes a corporation's "principal" place of business, the Ninth Circuit aggregates all of a corporation's places of business throughout a State to determine which *State* is the corporation's principal place of business. The Ninth Circuit thus concluded here that "California is [petitioner's] principal place of business." Pet. App. 3a. But the statute does not deem a corporation a citizen of "the *State* that is the corporation's principal place of business." It instead deems a corporation a citizen of "the State where it has its principal place of business," language that plainly points to a distinct "place of business" within a "State." That understanding reflects the ordinary meaning of the term "place of business"—*viz.*, a specific "establishment," "office," or "plant," rather than an aggregation of all operations throughout a State as a whole. Focusing the inquiry on which of a corporation's individual business sites constitutes its "principal place of business" necessarily directs attention to the corporation's headquarters, the location from which the corporation's chief executive officers control and direct the corporation's activities at all other individual locations.

The Ninth Circuit departed from the statutory text in a second basic respect as well. Even assuming it were appropriate to aggregate all of a corporation's business locations in a State in an effort to assess which State is the corporation's "principal place of business," the inquiry should still point to the State of the corporation's headquarters. The ordi-

nary meaning of "principal" is "chief," "highest in authority," or "most influential, consequential, and important." Law and business dictionaries accordingly define a corporation's "principal place of business" as its headquarters. The headquarters is more influential, and higher in authority, than any single location or aggregation of locations in a State. A number of federal regulations and provisions of state corporate law, consistent with the plain meaning of the term, explicitly define a corporation's principal place of business as its headquarters.

The Ninth Circuit's approach not only contradicts the statutory text, it also defies this Court's requirement that jurisdictional rules be clear and easy to administer. The test used by the Ninth Circuit requires examination, calculation, and balancing of numerous factors, each of which is itself open to multiple interpretations. The discovery and litigation required to determine in which State, if any, a corporation's operations "substantially predominate" is burdensome for courts and unpredictable for litigants, and fails to deliver clear or consistent results. The "total activities" test applied by other circuits is similarly uncertain and complicated. The headquarters test, in contrast, is straightforward in application and readily administrable in practice.

The headquarters test also coheres with the standard rules for determining citizenship in comparable contexts. This Court has long recognized that a natural person's State of citizenship is the State in which he maintains his "technically preeminent *headquarters*," *Williamson v. Osenton*, 232 U.S. 619, 624 (1914) (emphasis added)—the site of his purposefully "fixed" and "permanent" home. The head-

quarters test for corporate citizenship likewise bases citizenship on a corporation's intentionally fixed and permanent connection to a place. By contrast, the considerations balanced by the Ninth Circuit allow—indeed, require—a corporation's principal place of business to vary with fluctuations in market conditions, local regulations, or the size of a State's population and economy.

The headquarters test also accords with the statutory purposes. In enacting § 1332(c), Congress intended to eliminate the "evil" of a purely local corporation's avoiding state court jurisdiction by incorporating in a separate State in which it conducts no business. At the same time, Congress sought to preserve corporations' ability to seek the protection of a federal forum when litigating "in States remote from their headquarters." House Judiciary Hearings at 35-36. The headquarters test serves both of these goals, providing access to a federal forum when there is a possibility of prejudice, while preventing the gamesmanship that an exclusive focus on incorporation might otherwise permit. The test also furthers Congress's aim in CAFA, which amended § 1332 in 2005, to ensure the availability of a federal forum for class action lawsuits like this one.

For those reasons, the headquarters test should be applied in all circumstances when identifying a corporation's "principal place of business." Nonetheless, the Court could allow for a narrow exception to the headquarters test, limited to corporations that perform all their business activities in one State except for the activity conducted at their headquarters in a different State. That exception would have no application to petitioner. Rather, petitioner's princi-

pal place of business, under any approach this Court might adopt, should be its headquarters in Park Ridge, New Jersey.

ARGUMENT

I. THE STATUTORY TERMS AND STRUCTURE ESTABLISH THAT A CORPORATION'S PRINCIPAL PLACE OF BUSINESS IS ITS HEADQUARTERS

The terms of the diversity statute make a corporation a citizen of "the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). The Ninth Circuit's test for determining a corporation's citizenship departs from that language in two fundamental respects. First, while the statute requires a court to identify the particular place within a State that is a corporation's principal place of business, the Ninth Circuit aggregates all business locations throughout a State to determine which *State* is a corporation's principal place of business. Second, in determining a corporation's principal place of business, the Ninth Circuit fails to give sufficient weight to a corporation's headquarters—the place from which a corporation's chief executives direct and control all corporate operations. In ordinary understanding and in practical terms, the headquarters location—sometimes referred to as the "nerve center," *see Ill. Bell Tel. Co. v. Global NAPs Ill., Inc.*, 551 F.3d 587, 590 (7th Cir. 2008)—is "the principal place of business" of a corporation. And that would remain true even assuming, *arguendo*, that it were appropriate to aggregate multiple business locations throughout a State.

A. A "Place Of Business" Under § 1332(c)(1) Is A Physical Location Within A State, Not An Amalgamation Of All Business Operations Throughout A State

Because the diversity statute speaks in terms of "the State where [a corporation] has its principal place of business," 28 U.S.C. § 1332(c)(1), the statutory language requires a court to identify the single "place of business" within a State that constitutes a corporation's "principal" place of business. The text nowhere contemplates aggregation of multiple places of business throughout a State to determine which *State* is the corporation's principal place of business. The Ninth Circuit below engaged in precisely that manner of statewide aggregation, however, holding that "*California* is [petitioner's] principal place of business." Pet. App. 3a (emphasis added). That countertextual approach is fundamentally flawed.

1. Had Congress wished to adopt that sort of aggregation approach, it would have made a corporation a citizen of "the State *that is* the corporation's principal place of business." That formulation equates a "State" with the "principal place of business." By specifying instead that a corporation is a citizen of "the State where [a corporation] has its principal place of business," Congress expressly distinguished between a "State" as a whole, on one hand, and the specific location within a State that is the corporation's "principal place of business," on the other hand.

The ordinary meaning of "place of business" confirms that understanding. A "place of business"

normally refers to "[a]n establishment where business is conducted," such as "an office, a retail store, a manufacturing plant, or any other type of commercial or industrial establishment." *American Heritage Dictionary of Business Terms* 394 (David L. Scott, ed. 2009); *see also Webster's Third New International Dictionary* 1727 (1993) (defining "place" as, *inter alia*, "a building or locality used for a special purpose."); 2 *New Shorter Oxford English Dictionary* 2229-30 (3d ed. 1993) (defining "place" as, *inter alia*, "[a] building, establishment, or area devoted to a specific purpose"). Nothing in the text of § 1332(c) suggests that "place of business" in that provision carries anything other than its ordinary meaning. Indeed, this Court has interpreted that language in § 1332(c) to refer to a particular "office." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 317 n.9 (2006) (explaining that, "in almost every case," the "location of a national bank's main office and its principal place of business coincide").

The use of the term "where" in § 1332(c) reinforces that the relationship between the terms "State" and "principal place of business" is that the latter is a distinct establishment located within the former. The term "where," in this context, means "in which." *Webster's Third New International Dictionary* 2602 (1993) (defining "where" when used in this context as "at or in which place" and offering as examples "the room ~ he was working" and "the store ~ she bought her clothes"). Accordingly, the legislative history of § 1332(c) uses the phrase "where" interchangeably with "in which." S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3102 (explaining that a national corporation "would be regarded as a citizen of that

one of the States *in which was located* its principal place of business") (emphasis added); *see id.* (explaining that that the Committee adopted the recommendation of the Judicial Conference to make a corporation "a citizen of the State *in which* it maintains its principal place of business") (emphasis added). Because the term "where" means "in which," the use of that term to connect "State" with "principal place of business" makes clear that a corporation's "principal place of business" is a "place" *within* a "State," not a State itself.

The use of the singular "principal *place* of business," rather than the plural "principal *places* of business" fortifies the conclusion that a corporation's "principal place of business" is a particular place within a State. The use of the singular precludes determining a corporation's citizenship on the basis of multiple places of business. *See United States v. Hayes*, 129 S. Ct. 1079, 1084-85 (2009) (use of singular "element" rather than plural "elements" demonstrates intent by Congress that requirement apply to a single element). A corporation's "principal place of business" accordingly is a single, distinct business location within a State, not the State as a whole.

The text of § 1332(c) therefore prescribes a straightforward process for determining a corporation's citizenship: (i) identify a corporation's different "place[s] of business," *i.e.*, its distinct "establishment[s] where business is conducted," *American Heritage Dictionary of Business Terms*, *supra*, at 394; (ii) determine which of these places of business constitutes the corporation's "principal" place of business; and (iii) identify the State in which that principal place of business is located. By failing to

follow that process, and instead aggregating multiple places of business in each State to determine which *State* is petitioner's principal place of business, the Ninth Circuit fundamentally erred.

2. The use of the phrase "place of business" to refer to a particular business establishment is by no means unique to the diversity statute. A variety of federal and state laws use "place of business" to refer to a particular business establishment, not an aggregation of business operations in a State. Those provisions buttress the conclusion that the term carries the same meaning in § 1332(c).

a. A number of federal statutes make sense only if the phrase "place of business" refers to a particular business location rather than a State as a whole. For instance, certain statutes require corporations to identify the "address" of their "place of business." *See, e.g.*, 15 U.S.C. § 376(a)(1) (cigarette tax filings); 15 U.S.C. § 1173(a)(4) (registration for manufacturers of gambling devices); 21 U.S.C. § 460(c) (registration for poultry inspections). Related statutes provide for service on corporations by delivery or mail to a "place of business." *See, e.g.*, 15 U.S.C. § 1312(e)(1)(B) (antitrust civil demands); 15 U.S.C. § 21(f) (FTC complaints); 16 U.S.C. § 773i(f)(3) (enforcement of fisheries act); 39 U.S.C. § 3016(b)(3)(C) (administrative subpoenas). Another set of statutes requires corporations to allow access to a "place of business" for inspection. *See, e.g.*, 16 U.S.C. § 1538(d)(2)(B) (endangered species importers); 21 U.S.C. § 1034(d), (e) (inspection of eggs). And still other federal statutes compel a business owner to display certain permits or signs "on the outside of his place of business." 26 U.S.C. § 5180(a) (operators of

distilled spirits facilities); *see also* 12 U.S.C. § 1828(a)(1)(A) (requiring depository institutions to display a sign concerning insurance "at each place of business").

Other federal statutes likewise manifest the understanding that a "place of business" is a specific business site. For example, Congress made a business tax credit available to certain businesses that moved outside New York City "as a result of the physical destruction or damage of such place of business by the September 11, 2001, terrorist attack." 26 U.S.C. § 1400L(a)(2)(C). And another statute provides an exemption from certain labor laws for persons "employed inside or outside places of business where machinery is used to process wood products." 29 U.S.C. § 213(c)(7)(A)(i). Still other federal statutes expressly equate the term "place of business" with a particular business "establishment." *See* 17 U.S.C. § 101 (an "establishment" under copyright law is "a store, shop, or any similar place of business"); *see id.* (a "food service or drinking establishment" is "a restaurant, inn, bar, tavern, or any other similar place of business").

b. State laws governing corporations also regularly refer to a "place of business" as a specific physical establishment, not an amalgamation of business activity throughout a State. The Model Business Corporation Act, adopted by 30 states, requires corporations to maintain within the State "a registered office that may be the same as any of its places of business." American Bar Association Committee on Corporate Laws, Model Business Corporation Act § 5.01(1) (2008) (hereinafter "Model Business Corporation Act"); *see id.* at ix n.1 (listing states). Some

state laws expressly equate a corporation's "place of business" in the State with the corporation's "registered office," reinforcing that a place of business is a specific business establishment. For example, the Delaware Code states that the term "'place of business in this State' . . . shall be deemed to mean and refer to, unless the context indicates otherwise, the corporation's registered office." Del. Code Ann. tit. 8, § 131(b). Other States have laws that are to the same effect. 8 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 4046 (2008); *see also* Uniform Securities Act of 2002, § 102(21); Kan. Stat. Ann. § 17-6202(b); Okla. Stat. tit. 18, § 1021(B).

In sum, a corporation's "principal place of business" within the meaning of the diversity statute is a distinct business location within a State. It is not an aggregation of a corporation's business activities throughout a State.

B. Among A Corporation's Places Of Business, Its "Principal" Place Of Business Is Its Headquarters

1. Once a corporation's "principal place of business" is correctly understood to refer to a particular business establishment within a State, it becomes straightforward to identify which of the corporation's places of business constitutes its "principal" such place. "Principal" means "most important, consequential, or influential." *Webster's Third New International Dictionary* 1802 (1993); *see Comm'r v. Soliman*, 506 U.S. 168, 174 (1993) (applying this definition to a tax provision on an individual's "principal place of business"). And it also means "[c]hief" and "[h]ighest in rank, authority." *See Black's Law Dic-*

tionary 1355 (4th ed. 1951); *see also Webster's New International Dictionary* 1966 (2d ed. 1955) (defining "principal" as "[h]ighest in rank, authority, or importance; chief; directing; head").

Under those definitions, a corporation's headquarters is its principal place of business. When compared with any other single business location, the headquarters is the most "important, consequential, and influential" because it bears responsibility for directing and controlling the corporation's activities at all business locations. For the same reason, the headquarters is a corporation's "chief" business location and its "highest in rank" and "authority."

With regard to petitioner Hertz, for instance, the Ninth Circuit erroneously amalgamated all of petitioner's business locations throughout the State of California to determine that "California is Hertz's principal place of business." Pet. App. 3a. But when one correctly focuses the analysis on which of Hertz's *individual* business locations is its principal place of business—rather than which *State* is its principal place of business—it is plain that petitioner's most important and influential single site, and its highest in rank and authority, is its national headquarters at 225 Brae Boulevard, Park Ridge, New Jersey. Among the company's various individual locations, that site, which directs and controls all of Hertz's operations, exceeds in influence, rank, and authority any other single site—whether any of the 273 individual rental locations in California, *see* Pet. App. 28a ¶ 6, or any individual location elsewhere.

2. Even assuming, *arguendo*, that it were appropriate to aggregate all of a corporation's distinct business establishments throughout a State, the

"principal place of business" test would still point to the State of the corporation's headquarters. The headquarters is the most important location because it bears responsibility for directing and controlling *all* of the corporation's business activities in *all* States. Thus, by definition, a corporation's "headquarters" is its "chief" "place of business," *Webster's Third New International Dictionary* 1043. *Cf. Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 205-07, 212 (1936) (finding that corporation was domiciled for tax jurisdiction purposes in State where it maintained its headquarters rather than in State where it maintained its plants and certain additional offices, because "what is done at those plants and offices is determined and controlled from the center of authority at [the headquarters]").

Indeed, legal and business dictionaries, reflecting the ordinary meaning of the phrase, consistently define a corporation's "principal place of business" as its headquarters or executive offices. *Black's Law Dictionary*, for example, defines "principal place of business" as "[t]he place of a corporation's chief executive offices." *Black's Law Dictionary* 1187 (8th ed. 2004). And the *American Heritage Dictionary of Business Terms* similarly defines "principal place of business" as "[t]he location of a firm's head office." *American Heritage Dictionary of Business Terms*, *supra*, at 408.[1] Accordingly, as the Seventh Circuit

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[1] *See also* U.S. Legal Definitions, http://definitions.uslegal.com/p/principal-place-of-business/ ("A principal place of business is where the head office of a business is and where the books and records are kept and/or management works."); Law.com Dictionary, http://dictionary.law.com/Default.aspx?selected=1603 (defining "principal place of business" as the "location of head office of a business where the books and records

has understood, "a corporation has a single principal place of business where its executive headquarters are located." *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (1991).

Rather than recognize a corporation's headquarters to be its principal place of business, the Ninth Circuit first focuses on such factors as the "location of employees, tangible property, production activities, sources of income, and where sales take place." *Tosco*, 236 F.3d at 500. Only if no State contains a substantial predominance of those factors does the court consider the corporation's headquarters to be its principal place of business. *Id.* The Ninth Circuit's two-phased approach cannot be reconciled with the plain meaning of the term "principal place of business." A headquarters does not become the principal place of business only when other, less important factors prove inconclusive. For purposes of achieving a corporation's objectives, its headquarters, from which its chief executives direct and control all business operations, is more important, consequential, and influential than any other location or combination of locations in a single State.

3. a. Defining "principal place of business" as the corporation's headquarters accords with the meaning of that phrase in a number of provisions of federal law, fortifying the conclusion that it retains the same meaning in the diversity statute. For example, multiple federal regulations define "principal place

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are kept and/or management works"); BusinessDictionary.com, http://www.businessdictionary.com/definition/principal-place-of-business.html (defining "principal place of business" as the "[p]remises housing the offices of the senior-most executives of a firm and serving as its command and control center").

of business" as "the business location where the individuals who manage the concern's day-to-day operations spend most working hours and where top management's business records are kept." 13 C.F.R. § 124.3 (Small Business Administration); 49 C.F.R. § 23.3 (Federal Aviation Administration); 38 C.F.R. § 74.1 (veterans programs).

Similarly, federal regulations concerning investment firms define the "[p]rincipal place of business" as "the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser." 17 C.F.R. § 275.222-1(b); *see also* 17 C.F.R. § 275.203A-3(c). A regulation governing bids for State Department contractors provides that "[p]rincipal place of business means the geographic location of the main office or seat of management of the prospective offeror." 48 C.F.R. § 652.237-73(d) (statement of qualifications form). And a motor carrier regulation states that "[p]rincipal place of business means the single location designated by the motor carrier, normally its headquarters, for purposes of identification under this subchapter." 49 C.F.R. § 390.5.

b. State laws also identify a corporation's principal place of business as its headquarters or the location of its chief executive offices. In Massachusetts, for instance, a corporation's "[p]rincipal place of business" is "the corporate headquarters where the general executive offices are located and from which the corporation's activities are controlled and directed by executive officers of the corporation." Mass. Gen. Laws ch. 110C, § 1.

Other State statutes regulating particular industries define the principal place of business as the headquarters or executive offices. The Uniform Securities Act of 2002, adopted by 13 states and territories, defines a broker-dealer or investment adviser's "principal place of business" as "the executive office . . . from which the officers, partners, or managers of the broker-dealer or investment adviser direct, control, and coordinate the activities of the broker-dealer or investment adviser." Uniform Securities Act of 2002, § 102(24). In New Jersey banking law, "'[p]rincipal office' means the headquarters of a bank which is its principal place of business." N.J. Stat. Ann. § 52:18A-8.1a. In Kansas real estate law, "'[p]rincipal place of business' means a licensed place of business . . . which has been designated by a licensee as the primary headquarters from which all mortgage business and administrative activities are managed and directed." Kan. Stat. Ann. § 9-2201. And in an Iowa law concerning corporate takeovers, "'[p]rincipal place of business' means the executive office of a target company from which the officers, partners, or managers of the target company direct, control, and coordinate the activities of the target company." Iowa Code § 502.321A(7).

For those reasons, the plain and ordinary meaning of the terms of § 1332(c) makes a corporation a citizen of the State where it maintains its headquarters. The court of appeals erred in departing from that basic understanding.

II. INTERPRETING "PRINCIPAL PLACE OF BUSINESS" TO REFER TO A CORPORATION'S HEADQUARTERS AFFORDS A CLEAR AND EASILY ADMINISTERED JURISDICTIONAL RULE

This Court's precedents require jurisdictional rules to be clear and easily administered. A headquarters test readily satisfies those criteria, while competing approaches are complicated and unpredictable, and invite wasteful litigation. Thus, even apart from the text of § 1332(c), this Court's decisions require interpreting that provision to make a corporation a citizen of the State where it maintains its headquarters.

A. This Court Requires Jurisdictional Rules To Be Clear And Easily Administered

1. Because it must be ascertained in every federal case, the question of federal jurisdiction arises often and is frequently litigated. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). But as this Court has observed, "litigation over whether the case is in the right court is essentially a waste of time and resources," *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) (internal quotation marks omitted), and that "waste counsels strongly against" any interpretation that would "impair the certainty of" the Court's jurisdictional rules, *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004). It therefore "is of first importance to have a definition" affecting jurisdiction that "will not invite extensive threshold litigation," even if some applications of the jurisdictional rule may "appear somewhat arbitrary." *Navarro*, 446 U.S. at 464

n.13 (internal quotation marks omitted). In short, "jurisdictional rules should be clear." *Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002).

2. The Court's earliest decisions concerning a corporation's citizenship for diversity purposes afford a good example. In those cases, the Court held that a corporation could be deemed to have the citizenship of its shareholders, and "its shareholders would conclusively be presumed citizens of the incorporating State." *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145, 148 (1965). Those decisions were based on a "fiction," *id.*, not found in the text of the Constitution or the First Judiciary Act, allowing corporations to take advantage of the grant of diversity jurisdiction through an easily administered place-of-incorporation test.

Similarly, the rule that jurisdiction is determined at the time of filing, and is unaffected by subsequent events, was "not extract[ed] . . . from any constitutional or statutory text." *Grupo Dataflux*, 541 U.S. at 583 (Ginsburg, J., dissenting) (citing *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537 (1824) (Marshall, C.J.)). That rule instead was adopted "because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful." *Id.* at 580.

And in *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989), the Court relied on Federal Rule of Civil Procedure 21 to permit a court of appeals itself to "dismiss a [dispensable] nondiverse party" that destroys federal diversity jurisdiction—even though it had previously been "well settled that 'the Federal Rules of Civil Procedure . . . apply only in the federal district courts,'" *id.* at 840 (Kennedy,

J., dissenting) (quoting *UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965)). The Court recognized that "[a]ppellate-level amendments to correct jurisdictional defects may not be the most intellectually satisfying approach to the [diversity] spoiler problem," but it reasoned that "law is an instrument of governance," and thus "some consideration must be given to practicalities." *Id.* at 836-37 (internal quotation marks omitted). These cases illustrate the importance attached by this Court to jurisdictional rules that are clear and easily administered, and limit wasteful litigation.

B. The Headquarters Test Is Clear And Easily Administered, While Competing Approaches Are Not

1. a. The headquarters test satisfies the Court's standards for a jurisdictional rule. It requires a court to determine only one fact: the location from which a corporation's chief executives direct and control corporate operations. In most cases, the location of a corporation's headquarters is easily ascertained and can be quickly established through an affidavit of a corporate official. Here, for instance, a corporate official filed a declaration stating that "the corporate headquarters of Hertz" is "located at 225 Brae Boulevard, Park Ridge, New Jersey." Pet. App. 26a ¶ 1. That fact has never been—and could not be—disputed.

b. In most instances, a corporation's headquarters also can be readily ascertained from other sources. For example, the Securities and Exchange Commission's official Form 10-K, which satisfies the annual reporting requirements of Sections 13 and 15(d) of the Securities Exchange Act of 1934, 15

U.S.C. §§ 78m, 78o(d), calls for each company to state the address for its "principal executive offices." *See* Form 10-K at 5, *available at* www.sec.gov/about/forms/form10-k.pdf (SEC 1673 (04-09)). Those annual reports are freely and publicly available through the Securities and Exchange Commission's website, which allows the user to search for relevant documents by company name or other identifying information. *See* http://www.sec.gov/idea/searchidea/webusers.htm; Petitioner's Form 10-K (Mar. 4, 2009), *available at* http://www.sec.gov/Archives/edgar/data/47129/000104746909002230/a2191177z10-k.htm (identifying the location of petitioner's "principal executive offices" as "225 Brae Boulevard, Park Ridge, New Jersey"); *see also Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 161 (6th Cir. 1993) (defendant corporation at a pretrial hearing on jurisdiction "produced a copy of the 10-K" to demonstrate its principal place of business).

In addition, the Model Business Corporation Act requires each corporation to submit to the Secretary of State an annual report containing the address of its "principal office," *i.e.*, the place "where the principal executive offices of [the] . . . corporation are located." Model Business Corporation Act §§ 1.40(17), 16.21(a)(3) (2008). These reports also generally are publicly available through the Secretary of State's office or other services that collect them.[2]

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[2] Tawnya Plumb, *Conducting Company Research*, 32-JUN Wyo. Law. 52, 52-53 (June 2009) (explaining that, "[a]t the state level, each Secretary of State has the responsibility of making corporate records . . . publicly available," and "many company annual reports are available through websites such as AnnualReports.com"); M. Thomas Arnold, *Administrative As-*

c. Experience with the headquarters test demonstrates its simplicity and efficiency. The Seventh Circuit uses the headquarters test exclusively and finds it straightforward to administer. As explained by that court, "[s]ome courts use a vaguer standard. They look not just to where the corporation has its headquarters but also to the distribution of the corporation's assets and employees. We prefer the simpler test." *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1282-83 (7th Cir. 1986) (Posner, J.) (internal citation omitted).

To be sure, in certain situations, there may be a dispute about which of two (or several) locations constitutes a corporation's bona fide headquarters, or even about whether the corporation has a cognizable headquarters. But as the experience in the Seventh Circuit demonstrates, those sorts of disputes are likely to arise infrequently. In the vast majority of cases, including this case, a corporation's headquarters can be easily and efficiently identified. *Cf. Sisson v. Ruby*, 497 U.S. 358, 374-75 (1990) (Scalia, J., concurring in judgment) ("The time expended on such rare freakish cases will be saved many times over by a clear jurisdictional rule" that eliminates the "sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible.").

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pects of State Corporation Law, 28 U. Rich. L. Rev. 1, 18 (1994) (discussing Model Business Corporation Act and other reporting requirements that provide public access to "basic information about [a] corporation"); *see, e.g.*, Commonwealth of Virginia, State Corporation Commission, *View Corporate Annual Reports Online*, http://scc-internet.scc.virginia.gov/corporate/arfilings/corpsearch.asp.

2. In contrast to the corporate headquarters inquiry, the test applied by the Ninth Circuit "generate[s] excessive unpredictability and encourages expensive litigation to identify the 'principal place of business' for corporations that operate in multiple states." *Davis*, 557 F.3d at 1031 (Kleinfeld, J., concurring). As discussed, the test has two stages. First, where a State encompasses "a substantial predominance of corporate operations," that State is the principal place of business. *Tosco*, 236 F.3d at 500. In making that determination, a court must consider the location of: (1) employees, (2) tangible property, (3) production activities, (4) sources of income, (5) sales, and (6) purchases. *Id.*; *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990). If no State is home to a substantial predominance of such activities, the principal place of business is the State where "the majority of its executive and administrative functions are performed." *Indus. Tectonics*, 912 F.2d at 1092 (internal quotation marks omitted).

a. That test raises a host of complications and uncertainties. Among the questions raised by that test are the following:

* In considering *employees*, should the court consider the number of hours worked, or is it more important to determine the total amount of wages paid? *See Indus. Tectonics*, 912 F.2d at 1092 ("Of the nearly $400,000 paid in wages, more than 53% is paid to California employees."). Should a court count full-time employees, part-time employees, seasonal employees, or some or all of the above? Should a court look to total numbers of employees, or should it distinguish between salaried employees and those

paid by the hour, giving greater weight to the latter? *See id.* ("Although each plant employs approximately the same total number of people, the California plant employs more than 56% of the hourly employees, presumably those involved in actual production.").

* When assessing *facilities*, should the court consider only their total number, or does the size of a facility matter? *See Indus. Tectonics*, 912 F.2d at 1092 ("The California plant is larger than the Michigan plant."). Should the court look to the value of the real estate on which the facilities are located, or the value of the property inside them? *See id.* ("More than 63% of the corporation's equipment is located in California."). Should the inquiry take into account whether the company's ownership of the facility is "passive" or "visible," and if so how should those terms be defined? *Compare Montrose Chem. Corp. v. Am. Motorists Ins. Co.*, 117 F.3d 1128, 1135 (9th Cir. 1997) (suggesting that company's mere ownership of rental property was more "visible" than its operations overseeing investments), *with Village Fair Shopping Center v. Sam Broadhead Trust*, 588 F.2d 431, 434 (5th Cir. 1979) (holding that "single passive [real estate] investment" in one state could not outweigh management activity occurring at office in another state).

* In considering *sales*, should the court consider gross sales or net sales? *See In re Joint E. & S. Districts Asbestos Litig.*, No. CV-87-0537, 1990 WL 129194, at *1 (E.D.N.Y. Aug. 30, 1990) ("In 1987 and 1988, Ohio accounted for the largest volume of gross sales of any single state, [and] New Jersey accounted for the largest volume of sales revenue."). Should a court consider just the value of the sales, or should it

also consider the volume of sales? In light of the value placed on "visibility," *Montrose*, 117 F.3d at 1135, should a court weigh in-store purchases more heavily than internet-based transactions, or should it exclude internet-based sales altogether?

b. With respect to all of those factors—employees, facilities, and sales—the Ninth Circuit's framework also raises a host of more general questions. Among the general questions are:

* Should the court consider the factors on a per capita basis, or is it free to consider them without taking population into account? *Compare Davis*, 557 F.3d at 1030 & n.4 (evaluating business per capita), *with* Pet. App. 3a (holding that court was not required to "consider the comparative population of states in which a corporation operates to determine whether activities are significantly larger in one state than another," and refusing to do so). The answer to that question is highly significant because a non-per capita approach would likely make many national corporations citizens of California, closing off a federal forum in that State: both the population and the economy of California are 50% larger than that of any other State.[3] Accordingly, absent a per capita approach, any national corporation doing

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[3] In 2008, California had nearly 37 million people; the next largest state, Texas, had just over 24 million. *See* U.S. Census Bureau Population Estimates, State Population Estimates (2008), *available at* http://www.census.gov/popest/states/tables/NST-EST2008-1.xls. The same year, the gross state product—the state counterpart to gross domestic product—was $1.85 trillion in California and $1.22 trillion in Texas. *See* U.S. Bureau of Economic Analysis (2008), *available at* http://www.bea.gov/regional/gsp/.

business in California comparable to its per capita business in other States would likely be deemed a citizen of California. *See Davis*, 557 F.3d at 1029-30.

* What is the benchmark for finding that a relevant factor *substantially predominates* in one State. Is 5% more substantial? Is 10%? Is 20%? Is substantiality always measured in percentage terms, or is there some other measure? *See Davis*, 557 F.3d at 1029 (refusing to "adopt any hard and fast rule or percentage" to determine whether a corporation's business in one State "'substantially' predominate[s] over operations in other states").

* How does a court *balance* the various factors? Are some factors more important than others, so that if a particular factor predominates it cannot be overcome by other factors, or are all factors weighted equally? How many factors must substantially predominate in favor of one State: all of them; a majority of them; a plurality of them? *Cf. Tosco Corp.*, 236 F.3d at 501 & n.2 (California deemed principal place of business even though only 21% of corporation's employees worked in California, compared with 24% in Arizona).

* What is the relevant *time-frame* for evaluating the relevant factors? Should a corporation's business activities be measured over the course of the last calendar year? Fiscal year? Five years? A decade?

Those are only some of the questions raised by the Ninth Circuit's framework. That framework thus does not approach satisfying this Court's requirement that jurisdictional rules be clear and easily administered.

3. The competing approaches applied by other courts of appeals are also uncertain and difficult to administer.

a. The most common alternative is the "total activity" test applied by the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits. Their descriptions of that test lay bare its complexity and uncertainty.

The Fifth Circuit's statements are illustrative. It has described the test as requiring a court to consider two focal points: the nerve center and the place of activities. *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004). It has additionally explained that "[g]enerally," when a corporation's activities are "far-flung" the nerve center is more significant; when a corporation has its operations solely in one State and its executive offices in another, the place of activity is more significant; and when the activity of the corporation is "passive," the situs of the "brain" is given "greater significance." *Id.* If that were not complicated enough, the court has further instructed that the relevant factors "may be expanded or contracted in any given case." *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 411 n.15 (5th Cir. 1987). It is hardly surprising that the court acknowledges that "[t]he 'total activity' test is not an equation that can provide a simple answer to the question of a corporation's principal place of business. Each case necessarily involves somewhat subjective analysis." *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315 (5th Cir. 1980) (internal citation omitted).

Other circuits applying the total activity test have given similarly open-ended guidance. The Sixth Circuit directs district courts in that circuit to

"employ the total activity test, taking into consideration all relevant factors and weighing them in light of the facts of each case." *Gafford*, 997 F.2d at 163. The Tenth Circuit instructs courts to "look to the 'total activity of the company' or the 'totality of the circumstances,' considering 'the character of the corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations.'" *Gadlin v. Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000) (citation omitted). And the Eleventh Circuit recognizes that its test "requires a somewhat subjective analysis to choose between the results of the nerve center and place of activities tests, if they differ." *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005).

In addition, courts applying the total activity test consider a virtually limitless array of factors. A sampling of the factors includes:

- the locations in which the corporation is "qualified to do business," *Vareka Invs., N.V. v. Am. Inv. Props, Inc.*, 724 F.2d 907, 910 (11th Cir. 1984);
- the location of the corporation's "principal bank account," *Danos v. Waterford Oil Co.*, 351 F.2d 940, 941 (5th Cir. 1965);
- the location of the corporation's "work force," *Am. Foundation, Inc. v. Mountain Lake Corp.*, 454 F.2d 200, 202 (5th Cir. 1972);
- "the importance of the particular activity" performed at a location "to the corporate purpose and to the corporation as a whole," *J.A. Olson Co.*, 818 F.2d at 411;

- the location where the corporation's accounting functions, including payroll, are performed, *Toms*, 610 F.2d at 316;
- "the degree to which" the corporation's activities "bring the corporation into contact with the local community," *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164 (5th Cir. 1998);
- the location of corporate records, *Danos*, 351 F.2d at 941;
- "the exclusivity of decision making of the nerve center and the degree of autonomy delegated to other locations," *J.A. Olson Co.*, 818 F.2d at 412;
- the location where the corporation's shareholders are citizens and residents, *Vareka*, 724 F.2d at 910;
- the location of revenues and expenditures, *Danos*, 351 F.2d at 941;
- the location where the "corporate minutes," filings with the Secretary of State of the state of incorporation, and filings with the Internal Revenue Service specify as the corporation's headquarters or principal place of business, *Teal Energy*, 369 F.3d at 876-77;
- whether a "company's activities are not concentrated in one place," in which case the "court is entitled 'to give . . . "nerve-center"-related facts greater significance,'" *MacGinnitie*, 420 F.3d at 1239;

- "commonly known information" about the industry of which the corporation is a part, "even without a request that [the court] take judicial notice of particular facts," *Capitol Indem. Corp. v. Russellville Steel Co.*, 367 F.3d 831, 836 (8th Cir. 2004).

b. The First, Second, and Fourth Circuits apply tests resembling the total activity test, and engendering the same kind of complexity and uncertainty. The First Circuit applies the nerve center test only to a corporation that is "far flung" or "without physical operations." *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005). Otherwise, it applies what it calls a "locus of operations" test, which "search[es] for the location of the corporation's actual physical operations," taking into account such factors as facilities, inventory, equipment, and sales. *Id.* at 61-62. The Second Circuit similarly appears to have adopted a nerve center test for situations where corporate operations are spread across numerous states. *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979). When operations are centralized, the Second Circuit looks for the State "in which a corporation has its most extensive contacts with, or greatest impact on the general public." *Id.* And the Fourth Circuit applies the nerve center test when a corporation is "engaged primarily in the ownership and management of investment assets," but applies a "place of operations" test when a corporation "has multiple centers of manufacturing, purchasing, or sales." *Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998).

Finally, the Third Circuit applies a "center of corporate activity" test, which looks to the "the head-

quarters of day-to-day corporate activity and management." *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 852-54 (3d Cir. 1960). In applying this test, the court considers the location of executive officers responsible for conducting the business of the corporation. *Id.* at 854. It considers the location of the company's "accounting, legal, human resource, and loss-control activities." *Mennen Co. v. Atl. Mut. Ins. Co.*, 147 F.3d 287, 291 (3d Cir. 1998). And it also considers factors it regards as of "lesser importance," including the physical location of employees, tangible property, and productive capacity. *Kelly*, 284 F.2d at 854. That test produces the same lack of clarity as the others.

In short, only the headquarters test satisfies this Court's prescription to establish a clear and easily administrable jurisdictional rule. The competing approaches fall far short of that objective.

C. The Text And History Of § 1332(c) Mandate A Clear And Easily Administered Rule

1. The need for a clear jurisdictional rule is particularly compelling in this context because the text of § 1332(c) demands it. By specifying that a corporation is a citizen of "the State where it has its principal place of business," § 1332(c)(1) unambiguously provides that there will be one—and only one—principal "place" of business for each corporation. 28 U.S.C. § 1332(c)(1), *see* 13F C. Wright et al., *Fed. Prac. & Proc. Juris.* § 3624 (3d ed. 2009). To fulfill that mandate, the test for a corporation's principal place of business should produce the same outcome, regardless of which court applies it. When a test is so elastic and uncertain that lower courts through-

out the country can reach different conclusions, a corporation can effectively be assigned multiple principal places of business, defeating Congress's command for a single such place.

The headquarters test readily fulfills that mandate. Because of its ease of application, all courts will virtually always reach the same conclusion about a corporation's principal place of business. That is not true of the Ninth Circuit's test or the tests applied by other circuits (except the Seventh). Those uncertain tests enable courts to reach different conclusions about a given corporation's principal place of business. *Compare Ghaderi v. United Airlines, Inc.*, 136 F. Supp. 2d 1041, 1048 (N.D. Cal. 2001) (remanding case after holding that "United's principal place of business, as that phrase is used in diversity jurisdiction doctrine, is California"), *with Khouri v. United Airlines, Inc.*, 32 F. App'x 318, 319 (9th Cir. 2002) (affirming district court's determination that "the parties are diverse" because "United's principal place of business is Illinois"); *compare J.A. Olson Co.*, 818 F.2d at 409 (where corporation has "significant administrative authority and activity in one state and lesser executive offices but principal operations in another state," the principal place of business "is generally the district of the *former*") (emphasis added), *with Teal Energy*, 369 F.3d at 877 & n.13 (affirming district court decision based on conclusion that "[u]nder the total activity test, a corporation . . . with significant administrative authority and activity in one state and lesser executive offices but principal operations in another state has its principal place of business in the *latter*") (emphasis added).

2. The history of § 1332(c) reinforces Congress's preference for a clear and simple rule. When the Judicial Conference initially suggested to Congress that it should amend § 1332 to address corporate citizenship, it proposed that Congress provide "that a corporation may not invoke the Federal jurisdiction in a State in which it is doing business and from which it receives more than half of its gross income." Judicial Conference September Report, 2 U.S.C.C.A.N. at 3132. The Conference subsequently amended its recommendation, however, to propose the "principal place of business" formulation ultimately enacted by Congress. *Id.* As the Conference explained, the "principal place of business" criterion "provides a simpler and more practical formula" for determining jurisdiction. *Id.*; *see* Letter to House Judiciary Committee, 2 U.S.C.C.A.N. at 3107 ("principal place of business" test would "be simple in application"). The gross income test, by contrast, "would require evidence" and would "be difficult to apply." House Judiciary Hearings at 36.

Adopting the Ninth Circuit's test would be inconsistent with Congress's rejection of the gross income test as overly complicated. Indeed, the Ninth Circuit's multi-factor, multi-stage test makes the gross income test seem simple by comparison. That is also true of other competing approaches, including the total activity test. Only the headquarters test squares with Congress's desire for "a simpler and more practical formula."

III. THE HEADQUARTERS TEST ACCORDS WITH STANDARD RULES FOR DETERMINING CITIZENSHIP

Section 1332(c) uses a corporation's principal place of business to determine the State in which a corporation is a "citizen." 28 U.S.C. § 1332(c)(1). In *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006), this Court explained that statutes defining citizenship should generally be interpreted to accord with the normal understanding of that term. *Id.* at 318. Here, the normal understanding of citizenship—that it connotes a place chosen by a person to be his fixed and permanent home—favors the headquarters test.

For purposes of federal diversity jurisdiction, individuals are treated as citizens of the State of their domicile, "the technically preeminent *headquarters* that every person is compelled to have in order that certain rights and duties . . . may be determined." *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) (emphasis added). There is much in common between this personal "headquarters" and a corporation's headquarters. Both follow the well-settled principle that citizenship turns on the presence of a purposefully "fixed" and "permanent" connection to a place. *Gilbert v. David*, 235 U.S. 561, 569 (1915).

"Residence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile." *Texas v. Florida*, 306 U.S. 398, 424 (1939). Those elements depend largely on the intent of the person. *See Williamson*, 232 U.S. at 624. Because of the primacy of intent, an individual's domicile does not fluctuate in accordance with the demands of uncontrollable external events,

such as the demands of health or the exigencies of a relative's death. *See Texas*, 306 U.S. at 426. Only a fixed intent to relocate one's home indefinitely can suffice to effect a change in domicile. *See Gilbert*, 235 U.S. at 569.

A corporation's headquarters, like an individual's "preeminent headquarters," *Williamson*, 232 U.S. at 625, manifests a purposefully fixed and permanent connection to a particular place. While a corporation can relocate its headquarters, that change would result from the same manner of deliberative process followed by an individual when changing his permanent home. A headquarters test for corporate citizenship therefore offers comparable stability to the governing domicile test for individual citizenship.

Information on the movement of corporate headquarters over the past decade demonstrates the stability of the headquarters test. Of the companies in the 2009 Fortune 50, only one—The Boeing Company—moved its headquarters to a different State in the past ten years. *Compare 500 Largest U.S. Corporations*, Fortune Magazine, May 4, 2009, at F-1 (listing the Fortune 500 and the location of their headquarters), *with 500 Largest U.S. Corporations*, Fortune Magazine, April 26, 1999, at F-1 (same). And the Boeing move resulted from a highly deliberative process. *See, e.g.*, Sam Howe Vehovek & Laurence Zuckerman, *Boeing, Jolting Seattle, Will Move Headquarters*, N.Y. Times, Mar. 22, 2001, at A16 (describing the process).

The Ninth Circuit's approach, by contrast, makes a corporation's citizenship dependent on the fluctuations of the markets in a State at any given time. An influx of population into a State, a change in a

State's regulation of a product or service, a modification of a State's tax rate, or a shift in a State's economic health all could substantially affect the factors considered significant by the Ninth Circuit. Under the ordinary rules of citizenship, a corporation's citizenship should not wax and wane with vacillation in those sorts of uncontrollable variables. The more stable headquarters test better coheres with the basic conception of citizenship.

IV. THE HEADQUARTERS TEST IS CONSISTENT WITH THE PURPOSE OF § 1332, THE RELEVANT BANKRUPTCY BACKGROUND, AND CAFA

1. In enacting § 1332(c), Congress sought to achieve two purposes. The headquarters test is consistent with both.

a. First, in enacting § 1332(c), Congress sought to preserve a corporation's ability to seek the protection of a federal forum. That intent is reflected in Congress's rejection of proposals to more broadly restrict the availability of diversity jurisdiction for corporations. Among the proposals to limit a corporation's access to federal court were ones that would eliminate altogether the treatment of corporations as State citizens for diversity jurisdiction purposes, or that would deem corporations citizens of any State in which they do business. House Judiciary Hearings at 6, 35. The rejection of those, more restrictive proposals in favor of deeming a corporation a citizen of the one State where it has its principal place of business can only be understood to manifest an intent to retain for corporations the ability to obtain a federal forum because of concerns about local bias

against out-of-state corporations. *See* Judicial Conference March Report, 2 U.S.C.C.A.N. at 3119 (explaining that "effect" of deeming a corporation a citizen of any State in which it does business would have been "to deny to business corporations doing business over a wide territory, the sort of protection which they need against local prejudice and the benefit of the salutary rules and practices of the Federal courts").

The headquarters test is consistent with that intent. Indeed, Congress was specifically informed that corporations rely on their ability to "tak[e] their litigation into the Federal courts in States remote from their *headquarters*," States in which "they fear for the results that might be reached in the State court." House Judiciary Hearings at 35-36 (emphasis added). That concern with litigating in States outside the State where a corporation maintains its headquarters is understandable. A corporation often has deeper ties and is more closely identified with its headquarters State than with any other State.

Microsoft, for instance, maintains deeper ties and is more closely associated with Washington than any other State, even though its software is ubiquitous. Similarly, Wal-Mart possesses deeper connections and is more closely identified with Arkansas than any other State, even though it has more stores and derives more revenue in many other States. In accordance with that understanding, the headquarters test preserves a corporation's option to litigate in federal court in any State other than the State where it maintains its headquarters (and the State where it is incorporated).

The potential for bias in States other than the one in which a corporation maintains its headquarters is reflected in decisions reversing verdicts because opposing counsel focused on a national corporation's out-of-state headquarters in arguing for a verdict against the corporation. In *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265 (5th Cir. 1998), for example, the Fifth Circuit reversed an award of damages after finding that plaintiff's counsel repeatedly "reminded the jury that [defendant] Kmart is a national, not local, corporation, with its principal place of business in Troy, Michigan." *Id.* at 276. Counsel further argued that "'way up there in Troy, Michigan—way up there in Troy, Michigan, where they decide to write a two or three inch thick loss prevention manual, they don't think about the customers' safety and security in the parking lot [] [b]ecause they are more concerned about profits and not people.'" *Id.* (quoting argument to jury).

That argument clearly identified Kmart with its headquarters in Troy, Michigan, and sought to prejudice the jury against Kmart on that basis. In proposing the "principal place of business" test, the Conference specifically alerted Congress to the threat of such prejudice, noting this Court's decision in *New York Central Railroad Co. v. Johnson*, which disapproved of a similar argument by counsel. *See* Judicial Conference March Report, 2 U.S.C.C.A.N. at 3117 (citing *New York Central*, 279 U.S. 310, 319 (1920), where opposing counsel referred to defendant corporation as "an eastern railroad" that had "come into this town" and "sent on from New York" witnesses for the trial). Contemporary ordinances limiting the operations of national chains demonstrate

that the threat remains. *See* Br. for *Amicus Curiae* California Retailers Association (cert. stage) at 13-15; *see also Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 845 (11th Cir. 2008) (invalidating ordinance prohibiting "formula restaurant[s]" and "restrict[ing] 'formula retail' establishments"). By contrast, it would be surprising if any counsel sought to prejudice a local jury against a corporation by trying to associate it with a State that, at that given moment, had more corporate employees, facilities, or sales.

b. Section 1332(c) also had a second purpose: to selectively reduce the corporate diversity cases heard in federal court by eliminating the "evil" by which a local corporation, "engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State." S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3101-02 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)). The headquarters test combats the problem of "fictional" diversity cases that Congress concluded should never have been in the federal courts in the first place. *Id.* at 3101. Under the headquarters test, a corporation headquartered in a particular State cannot avoid state court jurisdiction in that State simply by dissolving its corporate charter and reincorporating elsewhere.

To be sure, a corporation conceivably could change its state of citizenship by shifting its headquarters to a different State. But in terms of the problem identified by Congress, shifting the headquarters State bears little comparison to shifting the

State of incorporation. What made the shift in the State of incorporation so troubling to Congress was that it involved a local business that "got the out-of-State charter merely because they could get some advantage taxwise or by virtue of the corporate powers the charter gave them, *but not because they intended to do business in the other State*." House Judiciary Hearings at 39 (emphasis added). When a corporation shifts its headquarters to another State, by contrast, it plainly does business in that other State: its chief executives direct and control its business operations from there.

Shifting headquarters differs materially from shifting the State of incorporation in other critical respects. Although there are few obstacles to dissolving a corporation in one State and reincorporating in another,[4] a company relocating its headquarters would have to change the physical location of its office, its tangible property, and its books and records. And it would also have to relocate the homestead of its senior officials and possibly many other employees as well. That is no small feat; the resulting upheaval would almost invariably be costly, disruptive, and time-consuming.

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[4] *See* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. Rev. 383, 423–26 (2007) (noting that the internal affairs doctrine and most states' current reincorporation rules allow corporations to dissolve and reincorporate with a simple majority vote, giving the board substantial control to dissolve and reincorporate in a more favorable state) (citing Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542, 548 (1990) (noting the ease of reincorporating since certain states have become "chartermongering" states)); *see also Black & White Taxicab*, 276 U.S. at 523-24.

Boeing, for example, changed its headquarters from Seattle to Chicago in 2001, relocating as many as 500 employees, and it was "still . . . dealing with the fallout from the relocation" five years later, in 2006. *See* Ameet Sachdev, *Boeing Change One of Heart: Chicago Headquarters Loss of 'World' Title Has a Symbolic Message*, Chi. Trib. Mar. 5, 2006. For large national companies, in particular, the transformation would "obviously result in worldwide media coverage," *Wojan v. Gen. Motors Corp.*, 851 F.2d 969, 975 (7th Cir. 1988), and might give rise to a significant local backlash. *See, e.g.*, Sam Howe Vehovek & Laurence Zuckerman, *Boeing, Jolting Seattle, Will Move Headquarters*, N.Y. Times Mar. 22, 2001, at A16 (stating that Boeing's decision to move was as "stunning, say, as General Motors pulling out of Detroit or Coca-Cola abandoning Atlanta"). Certainly, there is an overwhelming disincentive to relocate a headquarters simply to obtain federal court jurisdiction in a particular case.

In addition, while it may be possible in theory for a corporation operating under the headquarters test to undertake a strategic move to avoid the courts of a particular State, that possibility also exists under the Ninth Circuit's test. A corporation could use accounting mechanisms or adjust its marketing to affect the State that the Ninth Circuit's test would identify as the principal place of business. And because the headquarters becomes the principal place of business under the Ninth Circuit's two-stage framework if no State substantially predominates on other factors, a corporation in that position could change its headquarters to avoid a particular court system even under the Ninth Circuit's approach.

Finally, the gamesmanship concern identified by Congress involved "corporations doing a local business with a foreign charter." House Judiciary Hearings at 30. Significantly, Congress's concern did not extend to "corporations which do business over a large number of States." *Id.* Thus, for national corporations like petitioner, applying the headquarters test does not implicate the gamesmanship concern that led Congress to make a corporation a citizen of the State where it has its principal place of business.

2. The headquarters test is also consistent with Congress's understanding of the background of the "principal place of business" test. In enacting § 1332(c), Congress borrowed the "principal place of business" formulation from a bankruptcy statute that had used that language to determine the venue for a bankruptcy proceeding. *See* House Judiciary Hearings at 8 (citing 11 U.S.C. § 11). The actual experience under the bankruptcy statute, however, sheds little light on the test Congress intended to incorporate into § 1332(c). Bankruptcy courts used varying tests to determine the principal place of business. Some courts used the headquarters test, but other courts used different approaches.[5]

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[5] *See* 1 Frank O. Loveland, *A Treatise on the Law and Proceedings in Bankruptcy* 404, 405 (4th ed. 1912) (citing cases and explaining that "[t]he principal place of business of a corporation is usually where the general offices or headquarters are located without regard to the place named in the charter," and when "a corporation has several places of business, located in different districts, its principal place of business is where the affairs of the corporation are actually managed"); *accord Burdick v. Dillon*, 144 F. 737, 738 (1st Cir. 1906) (a corporation's "principal office, rather than a factory, mill, or mine, according to ordinary understanding and speech, as well as according to

Of substantially greater significance, Congress was informed that the bankruptcy courts applied a headquarters test in situations involving a corporation conducting business "in several States." House Judiciary Hearings at 37. "[W]hen a corporation's interests are rather widespread" in that manner, Congress was told, bankruptcy courts had "generally taken the view" that the "principal place of business" was the corporation's headquarters—*i.e.*, the "place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made." *Id.* That understanding should inform the proper interpretation of § 1332(c). That is particularly true because Congress was further advised that the recommendation to "follow[] the language of the Bankruptcy Act" stemmed from a desire to avoid a test "that would be difficult to apply" and that "would require evidence." *Id.* at 36. The "precedent in the . . . provisions of the Bankruptcy Act," Congress was informed, "would be simple in application." Letter to House Judiciary Committee, 2 U.S.C.C.A.N. at 3107.

3. The headquarters test is also consistent with Congress's enactment of CAFA in 2005. The enactment of CAFA is relevant because a statute should be interpreted, if possible, to cohere with a subse-

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the intent of Congress, constitutes the 'principal place of business,' within the meaning of the bankruptcy act"). *But see Cont'l Coal Corp. v. Roszelle Bros.*, 242 F. 243, 244-45 (6th Cir. 1917) (finding the principal place of business to be where all of the firm's mining activity was located, rather than the principal office).

quent related statute. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

In CAFA, Congress substantially broadened federal court diversity jurisdiction by providing federal courts with original and removal jurisdiction over any civil action where the matter in controversy exceeds $5,000,000, and "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). That expansion reflected Congress's concern with the practice of "forum shopping," in which attorneys raced to file actions in state court systems perceived to be most lax in their application of the requirements for a class action suit. S. Rep. No. 109-14, at 23, 52. Congress was also responding to "troubling" cases in which it was concerned that state courts had handled class actions inappropriately. *Id.* at 15-21, 25-26. Several of those cases involved litigation in California state courts. *See id.* at 17 & n.63; 19 & nn.77, 78; Testimony of Peter N. Detkin, Vice President, Assistant General Counsel, Intel Corp., Before the Committee on the Judiciary, U.S. House of Representatives, at 2, 4 (Feb. 6, 2002).

Congress created two limited exceptions to the expansion of diversity jurisdiction, for "Home State" and "Local Controversies." S. Rep. No. 109-14, at 28; *see* 28 U.S.C. § 1332(d)(4)(A), (B). Both exceptions turn on the citizenship of the defendant. The "Local Controversy" exception applies to cases in which "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). That "narrow" exception was "carefully drafted to

ensure that it does not become a jurisdictional loophole." S. Rep. No. 109-14 at 39. Congress likewise limited the "Home State" exception to cases in which "what is primarily a local group of claimants" asserts "primarily local claims under local law" against "primary defendants" that "are all citizens of the state in which the action was filed." *Id.* at 36, 39.

The headquarters test for corporate citizenship best promotes Congress's aim of preventing these exceptions from defeating Congress's effort to deter plaintiffs' attorneys from seeking the forum most likely to favor class action plaintiffs. Under a headquarters test, the CAFA exceptions would apply only when a corporation is sued in its State of incorporation or in the State of its headquarters.

Under the Ninth Circuit's test, by contrast, the purpose of CAFA is jeopardized. Instead of expanding federal jurisdiction, that test discourages resort to the federal courts for fear that any settlement or resolution of a class action will ultimately be vacated by a panel that measures "substantial predominance" differently than the district court in which the suit was resolved. The very uncertainty of its application gives plaintiffs additional opportunities to persuade potentially receptive fora that the corporation is a citizen of that State. The approaches of other circuits create similar uncertainty.

The Ninth Circuit's approach to the question whether its factors should be applied on a per capita basis poses a particularly serious threat to CAFA's goals. If, as in this case, the court refrains from applying a per capita approach, many national corporations could be deemed a "Home State" or "Local" defendant in California. *See* pp. 33-34, *supra*. That

would allow class-action plaintiffs to structure the class so that two-thirds or more are from California, eliminating the ability of a national corporation sued there to remove the case to federal court.

V. ANY EXCEPTION TO THE HEADQUARTERS TEST SHOULD BE LIMITED TO CORPORATIONS THAT PERFORM ALL BUSINESS ACTIVITY IN ONE STATE, EXCEPT THE BUSINESS ACTIVITY PERFORMED AT THE HEADQUARTERS

The headquarters test should be applied in all circumstances. That approach not only accords with the text of § 1332(c), but it also fulfills the need for a simple and easily administered test. There is no affirmative reason to create an exception. The headquarters test is consistent with the purposes of § 1332(c). By contrast, any exception to that test could not be squared with § 1332(c)'s text and would create the potential for wasteful litigation on whether the exception applies.

Nevertheless, the Court could, if it deemed warranted, allow for the possibility of a narrow exception to the headquarters test. That exception should be confined to situations involving a corporation that performs all of its business activity in one State, with the exception of the business activity conducted at its headquarters site in a different State. *Cf. Diaz-Rodriguez*, 410 F.3d at 62 (holding that principal place of business is in State where corporation's "actual physical operations" exist, where "all of [the corporation's] extensive physical operations [are] in one state" and "its administrative and executive functions [are] in another state"). That limited ex-

ception at least would stop short of opening the door to a flood of wasteful litigation on a threshold jurisdictional question. Opening the door more widely not only would run contrary to the text of § 1332(c); it also would engender precisely the sort of wasteful litigation that jurisdictional tests should avoid.

Any such exception would not affect the proper disposition of this case. This case does not involve a company that conducts all of its business in one State except for the business it performs at its headquarters site in a different State. To the contrary, petitioner operates rental facilities in 44 of the 50 States, Pet. App. 27a ¶ 3, and "its business activities are spread among the 44 states where it does business," *id.* at 29a ¶ 10. Accordingly, even if the Court were inclined to allow for an appropriately cabined exception to the headquarters rule, any such exception would not apply here.

Indeed, petitioner should be found a citizen of the State of its headquarters even if the Court elected to apply a test examining a corporation's "total activity" or "corporate operations," based on the array of factors considered by the Ninth Circuit and other courts of appeals that embrace that type of approach. *See* pp. 31-39, *supra*. Any test that turns in material part on the aggregate quantity of a corporation's business activity in a State must be applied on a per capita basis, or else corporations would regularly (and unjustifiably) be deemed citizens of California or other populous States. Normalizing the various measures of business activity in this case on the basis of State population would preclude any conclusion that petitioner's activity in California materially

exceeds its activity in other States.[6] Moreover, the courts of appeals that apply a "total activity" approach generally agree that where, as here, a corporation's activities are spread across multiple States, the corporation's principal place of business is its headquarters, which directs and controls its widespread operations. *See* pp. 35-38, *supra*. In all events, consequently, there should no basis in this case to conclude that "the State where [petitioner] has its principal place of business," 28 U.S.C. § 1332(c)(1), is any State other than New Jersey, where petitioner maintains its corporate headquarters at 225 Brae Boulevard, Park Ridge.

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[5] For instance, while California's population is more than twice that of Florida's, *see* Pet. App. 24a, petitioner's business activity in California is substantially less than twice that in Florida with respect to each of the various measures considered by the district court, *see id.* at 8a-9a.

CONCLUSION

The judgment of the court of appeals should be reversed.

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v.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether, for purposes of determining principal place of business for diversity jurisdiction citizenship under 28 U.S.C. § 1332, the main focus must be on where the corporation's business operations are performed rather than solely on the location of the corporation's headquarters.

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JURISDICTION

Mindful that this Court may have already addressed the following jurisdictional issue incident to its grant of certiorari, Respondents raise the arguments below in the event that this Court has reserved this issue for determination with the merits of this appeal. Respondents dispute Petitioner's assertion that appellate jurisdiction exists here pursuant to 28 U.S.C. § 1254. Generally, there is no appellate review of a district court order remanding a case for lack of subject matter jurisdiction. 28 U.S.C. § 1447(d); *Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 129 S. Ct. 1862, 1866 (2009). This prohibition manifests a long-standing Congressional policy opposing "interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court." *See, e.g., Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006).

The Class Action Fairness Act ("CAFA") created a limited exception, codified at 28 U.S.C. § 1453(c), which provides only a 70-day window in which an appeal must be brought to final judgment. 28 U.S.C. § 1453(c)(4) ("If a final judgment on appeal under paragraph (1) is not issued before the end of [70 days], the appeal shall be denied"). However, nothing in that section provides for additional review by this Court. There is no tension between applying § 1453(c)'s limited window of appellate review and holding that § 1447(d)'s prohibition of appellate review applies thereafter; the express language of § 1453(c) and the legislative history confirm that is

what Congress intended. *See* 28 U.S.C. § 1453(c)(1) (stating that § 1447 applies to CAFA remands, excepting the limited appeal provided elsewhere in § 1453). Here, appellate jurisdiction terminated, at the latest, 70 days after the appeal was docketed by the Ninth Circuit (*i.e.*, November 4, 2008).

STATEMENT OF THE CASE

This case is limited to claims arising under California law, on behalf of California workers only. By virtue of the definition of the class contained in Respondents' initial Complaint (and by the admission of Petitioner The Hertz Corporation ("Hertz")), Respondents Melinda Friend and John Nhieu ("Respondents") and the class of employees they seek to represent are citizens of California. *See* Pet. App. 18a. It is also undisputed that Hertz does more business in California than in any other state. *See* Pet. App. 28a.

The statute at issue, 28 U.S.C. § 1332(c)(1), provides that, for purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business[.]" Congress added the "principal place of business" prong of this test in 1958. *See* Pub. L. No. 85-554, 72 Stat. 415 (1958) (codified as amended at 28 U.S.C. § 1332(c)(1)).

In its opinion below, the United States District Court for the Northern District of California summarized the Ninth Circuit's test for determining a corporation's principal place of business for purposes of diversity jurisdiction as follows:

> Where the majority of a corporation's business activity does not take place in one state, the state in which the corporation's business activity is "significantly larger than any other state in which the corporation conducts business" is the corporation's principal place of business. *See Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 500-02 (9th Cir. 2001). In determining whether a corporation's business activity "substantially predominates in a given state," a district court must make a "comparison of that corporation's business activity in the state at issue to its business activity in other individual states." *See id.* at 500. In making such comparison, the court "employs a number of factors," including "the location of employees, tangible property, production activities, sources of income, and where sales take place." *See id.*; *id.* at 497, 500-02 (holding that where corporation did not employ plurality of employees in California, but did have plurality of manufacturing and retailing locations in California, and generated plurality of sales in California, California was principal place of business). *If, however, "no state contains a substantial predominance* of a corporation's business activities," the corporation's principal place

> of business *is its "nerve center,"* which is "the state where the majority of its executive and administrative functions are performed." *See id.* at 500 (applying "place of operations test"; noting corporation failed to offer sufficient evidence of business activity in other state that could "reasonably compare" to amount of operations in California).

Pet. App. 6a-7a (emphasis added).

Throughout this brief, Respondents refer to this formulation of the Ninth Circuit's test (or analogous tests from other circuits) as the "business realities" test. Under this test, a court must first determine whether there is a substantial predominance of a corporation's business activities in any one state, by comparing factors including the location of employees, tangible property, production activities, sources of income, and where sales take place. If the court finds a substantial predominance, then that state is the principal place of business. If not, the court relies upon the state in which the corporation's nerve center is located.

As will be discussed in more detail below, the Ninth Circuit, and every other circuit court except the Seventh, determine a corporation's "principal place of business" by employing tests that weigh a variety of factors which in combination establish the principal location of the corporation's business activities. *See Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026, 1033 (9th Cir. 2009) (Kleinfeld, J., concurring) (describing the various tests employed by the circuit

courts). The Seventh Circuit is the only court that determines a corporation's principal place of business by focusing solely on the location of "corporate headquarters."

In its Notice of Removal and as the district court found, Hertz admitted that it derives more revenue, employs more workers, and rents more cars in California than in any other state. *See* Pet. App. 8a. In fact, Hertz does approximately 20% of its business in California and performs nearly twice as much business in California as it does in the State in which it has its second-largest amount of business activity (Florida). *See id.* Because Hertz does such a substantial portion of its business in California, Respondents moved to remand the case back to California state court. Pet. App. 4a-5a. The district court granted Plaintiffs' Motion to Remand on January 15, 2008.[1] Pet. App. 4a, 11a.

Hertz petitioned for permission to appeal the district court's ruling. The Ninth Circuit denied Hertz's Petition on April 17, 2008. Pet. App. 12a. Hertz then moved for reconsideration or rehearing. Pet. App. 13a. The Ninth Circuit granted the motion for reconsideration, but ultimately affirmed the

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[1] The district court did not "den[y] Petitioner's request to 'take judicial notice of the fact that California's population is larger than that of Florida[.]' " Pet. Brief 8. Rather, the district court did not find this fact relevant given the requirements of the Ninth Circuit's test for "principal place of business" for purposes of diversity jurisdiction. *See* Pet. App. 10a.

district court's order remanding the case to California state court, and found that California was Hertz's "principal place of business." Pet. App. 1a-3a, 13a. This Court then granted Hertz's petition for certiorari.

SUMMARY OF THE ARGUMENT

This case presents the question whether the phrase "principal place of business" in the diversity statute, 28 U.S.C. § 1332(c), was intended to denote nothing more than the address of the corporation's "headquarters." The answer is "no."

In fact, in adopting the phrase in question, Congress's intent was to minimize legal fictions by making corporations citizens of the State where, in comparison to all other States, their business operations substantially predominate. This conclusion is supported by the plain meaning of the statutory language, the legislative history of the statute, and the purposes that Congress sought to promote in amending the diversity test.

1. The plain meaning of a statute's language is the starting point of statutory construction and, if unambiguous, the ending point. Hertz insists that the "ordinary meaning" of the statutory language proves that it was intended to create a simple, bright line test. Pet. Brief 10. However, of the eleven circuit courts which have examined the statute, only the Seventh Circuit has viewed the ordinary meaning the

same way as Hertz does. That alone suggests that Hertz's "ordinary meaning" is suspect.

More importantly, this Court's construction of the identical statutory language reveals the error in Hertz's contention. In *Commissioner of Internal Revenue v. Soliman,* 506 U.S. 168 (1993), *superseded by statute as stated in Beale v. C.I.R.,* T.C. Memo. 2000-158 ("*Soliman*"), this Court was required to interpret the phrase "principal place of business" within the context of resolving a tax exemption issue.

That analysis focused on the key point that the "*commonsense* meaning of 'principal' suggests that *a comparison of locations* must be undertaken." 506 U.S. at 174 (emphasis added). Because the phrase "principal place of business" *compels a comparison* between two or more places, it simply *cannot* be a mere proxy for the corporate headquarter's address. Indeed, one of Hertz's major arguments actually supports this point. Hertz insists that the benefit of its proffered "headquarters" proxy test is that it "requires a court to determine *only one fact*: the location [of the corporation's headquarters]." Pet. Brief 28 (emphasis added). But determination of a single fact is the opposite of the type of comparative analysis which this Court declared was the commonsense meaning of "principal place of business" as used in other statutes.

Statutory construction principles recognize that when it can be demonstrated that Congress knew how to say something simply and directly, a strong

inference arises when Congress chooses other language. As set forth below, there are numerous federal statutes which prove that Congress knew how to use the terms "headquarters" or "principal executive office" when it desired to do so. Tellingly, it did not use such language here.

2. Likewise, the legislative history of the 1958 amendment to 28 U.S.C. § 1332(c) rebuts Hertz's position. In adopting the phrase "principal place of business," Congress's intention was to attack easy (and unfair) access to federal courts enjoyed by foreign corporations when such access was not justified by the purpose underlying the diversity statutes *i.e.*, protection of true "foreign" entities from local bias. In adding a provision that made a corporation a citizen not only of its State of incorporation, but also of the State where it had its "principal place of business," the 1958 amendment was designed to reduce access to federal courts and to prevent jurisdictional gamesmanship by corporations.

In seeking to prevent local corporations from being able to evade their home State courts, Congress selected a phrase from the Bankruptcy Act ("principal place of business") which had a long history of judicial construction. As explained in S. Rep. No. 85-1830, there is:

> "ample precedent in the decisions of our courts and in federal statutes such as the provisions of the Bankruptcy Act [11 U.S.C. § 11]. There is *thus* provided *sufficient*

> *criteria to guide* courts in future litigation under this bill."

S. Rep. No. 85-1830, 85th Cong. (1958), *reprinted in* 2 U.S.C.C.A.N. 3099, 3102 ("S. Rep. No. 85-1830") (emphasis added).

Consideration of that "ample precedent" confirms that the term "principal place of business" was not merely shorthand for a corporation's headquarters; rather, it was a term calling for an examination of the various aspects of the corporation's business operations to determine where the corporation actually conducts its business. In fact, shortly after the passage of the 1958 amendment, one court conducted a thorough review of the pre-1958 bankruptcy venue precedents. It concluded that most cases construing "principal place of business" under the Bankruptcy Act "are in accord that this finding always has been determined by an analysis of the totality of corporate activity rather than the mere determination of the location of executive offices." *Gilardi v. Atchison, Topeka & Santa Fe Rwy. Co.*, 189 F. Supp. 82, 86-87 (N.D. Ill. 1960) ("*Gilardi*.")

If accepted, Hertz's "headquarters" test would run afoul of the intended purpose of the amendments to the statute. Congress recognized that relying simply on the State of incorporation created an inherent unfairness in allowing "a corporation to avoid trial in the state where it has its principal place of business by resorting to a legal device not available to the individual citizen." S. Rep. No. 85-1830, at 3102. But

if corporations could ignore where they perform most of their business operations in favor of a test that simply looks at where their corporate headquarters is located, much of the same unfairness would arise.

3. Hertz stresses the alleged "simplicity" of administering its "headquarters" test over the plain language of the statute *and* Congress's intent. However, both Supreme Court precedent and Congressional actions rebut Hertz's assertion that "jurisdictional rules" must be simple. There are many examples of threshold jurisdictional issues which require fact-intensive analysis, often aided by discovery rights.

For instance, the process of determining the citizenship of natural persons for purposes of diversity jurisdiction is at least as fact-intensive as Hertz claims the "place of operations" test is, but this Court has approved that process for at least a century. Similarly, determining whether a district court has *in personam* jurisdiction over a foreign corporation or whether a plaintiff has standing is an uncertain and fact-intensive process for which there is no bright line test, and which might require extensive discovery. Finally, CAFA itself confirms that accuracy trumps simplicity in making jurisdictional determinations. It does so both by creating a factually complex evaluation for determining jurisdiction and by *intentionally* leaving untouched § 1332(c)'s test for corporate citizenship.

Moreover, even if, *arguendo*, such "ease" or "simplicity" were a valid goal for this Court to weigh, Hertz's proposed "headquarters" test would not meet this goal because it is not nearly as simple and easily administered as Hertz suggests. A series of factual questions would arise, and the determination would be complicated by the fact that corporations (including Hertz itself) often have *multiple* designated "headquarters."

4. Hertz's proposed test for determining the location of corporate headquarters is subject to abuse and would lead to unfair and nonsensical results. Because Hertz recognizes how easily its proposed bright line "headquarters" test can be abused, it proposes a "narrow exception" for corporations who perform 100% of their business activities in one State, but locate their headquarters in a different State. But Hertz's proposal does nothing to prevent abuse because it could be easily circumvented. A corporation seeking to escape the exception merely need open a skeletal sales office (or other location performing "non-headquarters" business activity) in a different State. Moreover, its proposed "exception" finds no support in either the statute's language or its legislative history.

Hertz argues that if its proffered "headquarters test" is rejected, any business operations test must be based on a per capita analysis rather than using actual gross numbers. But, the per capita approach does not accurately identify the "principal place of a

business" of a company. As demonstrated in the hypothetical below, even if Hertz conducted 98% of its business in California and only 2% of its business in Wyoming, Wyoming would be considered Hertz's "principal place of business" under the per capita approach. Such an illogical result cannot be accepted.

Moreover, a per capita test approach would unjustifiably prevent large States from enforcing their own laws through their own courts. Diversity jurisdiction was not designed to allow a major California employer such as Hertz to profit from California's large economy and then, for purposes of removal, avoid the jurisdiction of California's courts.

ARGUMENT

I. BASIC CANONS OF STATUTORY CONSTRUCTION SUPPORT APPLICATION OF THE BUSINESS REALITIES TEST.

A. The purpose and language of the 1958 amendment is contrary to Hertz's headquarters test.

Statutory construction aims to ascertain legislative intent. Thus, any ambiguities in the instant statutory language should be resolved in the way that best furthers Congress's intention and purpose. *See Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). Accordingly, the starting point of any analysis here must be to consider the evil that Congress was attempting to rectify.

As detailed in Section II *infra*, that evil was that corporations that did most of their business in a given State were able to escape accountability in state courts – and burden federal courts – by the mere expediency of choosing to be incorporated elsewhere. Such corporations, with a heavy "local presence" in a given state, did not fit the paradigm for which diversity jurisdiction was created, *i.e.*, the need "to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts[.]" *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 774 (9th Cir. 1992) (quoting S. Rep. No. 1830, at 3102). Furthermore, treating such "local" corporations as if they were "foreign" gave them an unfair benefit denied to all other citizens and corporations doing business in the State, and added numerous local controversies to the federal docket.

Against this backdrop, this Court must ascertain why Congress chose the phrase "principal place of business" as the determinative factor of a corporation's citizenship for diversity purposes. As noted in Section III.C *infra*, corporations can (and do) relocate their headquarters with relative ease, enabling them to divorce the state of their (diversity) "citizenship" from the state in which they actually conduct the bulk of their business activities – a situation analogous to the dichotomy between place of actual business versus state of incorporation. Thus, a test

based on the location of a corporation's headquarters would lend itself to the same type of manipulation.

Here, both the plain meaning of the phrase "principal place of business" and the purpose of the statutory amendment dictate the same conclusion – that Congress did not mean, and could not have meant, to adopt a test which focused merely on the location of a corporation's headquarters, rather than on where a corporation actually conducts most of its business.

1. By its own terms, "principal place" requires a comparison between two or more places. Thus, it cannot simply mean the address of the corporate headquarters.

In advancing its argument that the phrase "principal place of business" is really synonymous with "headquarters," Hertz insists that its interpretation flows from the "ordinary meaning" of the phrase. Pet. Brief 10. Just the opposite is true as is demonstrated by this Court's analysis in *Soliman,* 506 U.S. 168.

Soliman required construction of the phrase "principal place of business" as used in a statute governing whether a taxpayer's home office was deductible. In that context, the majority, in an opinion authored by Justice Kennedy, noted that the "*commonsense* meaning of 'principal' suggests that *a comparison of locations* must be undertaken. . . .

Courts cannot assess whether any one business location is the 'most important, consequential, or influential' one without comparing it to all the other places where business is transacted." 506 U.S. at 174 (emphasis added); *accord, id.* at 179 (Blackmun, J., concurring) (emphasis added) ("As Justice Kennedy points out, this phrase [principal place of business] invites and *compels a comparison*"). This makes perfect sense given that the word "principal" is a relative term. This commonsense meaning defeats Hertz's argument. If in using the phrase "principal place of business" Congress meant nothing more than the corporation's "headquarters," where is the "comparison of locations" that the commonsense meaning of this language demands?[2]

In this sense, one of Hertz's major arguments actually supports Respondents' position. Hertz argues that the benefit of its proffered "headquarters" test is that it "requires a court to determine only one fact: the location [of the corporation's headquarters.]" Pet. Brief 28. But determination of *a single fact* is not the

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[2] *Soliman* rejected an objective formula, determining that "the ultimate determination of the principal place of business [is] dependent upon the particular facts of each case." It identified two primary factors to consider in making this determination – "the relative importance of the activities performed at each business location and time spent at each place." *Id.* at 174-75. The point where goods and services are delivered is to be given great weight in this decision-making process, rather than myopically focusing on the location of the managerial focal point. *Id.*

type of comparative analysis that this Court declared was the commonsense meaning of "principal place of business."

2. Had Congress simply intended to mean "headquarters" or "principal executive office," it could have easily used that language.

An axiom of statutory construction recognizes that when it can be demonstrated that Congress knew how to say something simply and directly, a strong inference arises when Congress chooses to use other language. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994) (*superseded by statute as stated in U.S. S.E.C. v. Fehn*, 97 F.3d 1276 (9th Cir. 1996)), this Court pointedly observed that "Congress knew how to impose aiding and abetting liability when it chose to do so" and, therefore, the fact that it did not use the words "aid" and "abet" in the statute at issue showed that it did not intend to impose aiding and abetting liability.[3]

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[3] *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (given that Congress knows how to refer to "ownership" in other than the formal sense, its failure to do so in the Foreign Sovereign Immunities Act's definition of foreign state "instrumentality" was significant); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) ("Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy"); *Whitfield v. United States*, 543

(Continued on following page)

The foregoing principle vitiates Hertz's plain meaning argument. Many federal statutes demonstrate that Congress knew how to purposely use the terms "headquarters" or "principal executive office" when it desired to do so.[4] *Soliman* makes this very point. In rejecting the home office as the "principal place of business," this Court stated:

U.S. 209, 216 (2005) (Congress has imposed an explicit overt act requirement in 22 conspiracy statutes, yet has not done so in the provision governing conspiracy to commit money laundering).

[4] *See, e.g.*, 36 U.S.C. § 110308 (proper service of process, which includes service on *corporate headquarters* relating to patriotic and national organizations); 49 U.S.C. § 503(b) (location for service of process on motor carriers of migrant workers includes Office of Transportation Authority in jurisdiction of a carrier's *headquarters* when a carrier does not have a designated service agent); 49 U.S.C. § 10706(a)(2)(B) (rail carrier seeking rate agreements must include in its verified statement to the Board the mailing address and telephone number of the carrier's *headquarter's* office); 15 U.S.C. § 78m(d) (location to send certain insurance security issuers' reports is the insurance company's *principal executive office*); 26 U.S.C. § 6323(f)(2) (for purposes of determining the residence of a corporation or partnership, situs of personal property subject to lien shall be deemed the place at which the *principal executive office* of the business is located); 49 U.S.C. § 20104(c) (certain types of specific civil actions may be brought in the judicial district in which employer has its *principal executive office*); 49 U.S.C. § 20113(c) (venue of civil action for enforcement by Secretary of Transportation includes the judicial district where defendant has its *principal executive office*); 49 U.S.C. § 21302(b) (location in which Attorney General shall bring civil action to collect civil penalty in railroad carrier violation includes the judicial district where the defendant has its *principal executive office*).

> The statute does not refer to the '*principal office*' of the business. If it had used that phrase, the taxpayer's deduction claim would turn on other considerations. The statute refers instead to the '*principal place*' of business. It follows that the most important or significant place for the business must be determined.

506 U.S. at 174 (emphasis added). Likewise, in construing § 1332(c)(1), it matters that Congress used "principal place of business" rather than "headquarters" or "principal executive office," two terms with which it was quite familiar.

B. Hertz's arguments concerning the meaning of "principal place of business" are contrary to the plain meaning of that language.

Hertz insists that the statutory language requires a court to identify "the single 'place of business' within a State" constituting a corporation's "'principal' place of business." Pet. Brief 15. In purporting to construe the ordinary meaning of "principal place of business," Hertz advances two illogical arguments.

First, ignoring the critically-important word "principal," Hertz instead analyzes the phrase "place of business" in isolation and states that it "normally refers to '[a]n establishment where business is conducted,' such as an office, a retail store. . . ." Pet.

Brief 15-16 (citations omitted).[5] Hertz then asserts "[n]othing in the text of § 1332(c) suggests that 'place of business' in that provision carries anything other than its ordinary meaning." *Id.* This, of course, ignores that the word "principal" in the text of the statute does exactly that.[6]

Second, Hertz asserts that the word "where" (within the phrase "a citizen . . . of the State where [it] has its principal place of business") supports its claim that the phrase must refer to a single specific location within a State. Pet. Brief 15-16. But contrary to Hertz's construction, use of the word "where" is not limited to designating a "specific location within a State." Pet. Brief 15.

A simple hypothetical proves the point. Consider if Congress had, instead, provided that a corporation

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[5] Hertz's chosen definition is highly self-serving. Another recognized definition states that "place" is "a very indefinite term. It is applied to *any* locality, limited by boundaries, however large or however small. It may be used to designate a country, *state*, county, town, or a very small portion of a town." *Black's Law Dictionary* 1307 (4th rev. ed. 1968) (citations omitted) (emphasis added).

[6] When Hertz does eventually address the full phrase, "principal place of business," it attaches great importance to a definition of that language found in the *American Heritage Dictionary of Business Terms* ("the location of a firm's head office.") Pet. Brief 22. However, what Hertz neglects to mention is that the *very next* definition of that phrase is "the location where the majority of activities relative to a business take place." *American Heritage Dictionary of Business Terms* (David L. Scott, ed. 2009), at 408.

would be a citizen of "the State where the corporation has the majority of its employees." Obviously, this statute would require the type of aggregating and State-by-State comparison which Hertz claims the use of the word "where" necessarily precludes.[7]

Furthermore, even if one assumed *arguendo* that "principal place of business" had to be restricted to a given place within a State, Hertz's argument would still fail because the "most important" place of a corporation's business is not invariably the corporate headquarters. For example, assume the Venetian Resort in Las Vegas was the sole hotel/casino property of its corporate owner and also assume that, for tax or other business purposes, the corporation's headquarters were located in Arizona. Few would seriously argue that the activities at the headquarters were "more important" than the activities at the hotel-casino-resort.

Hertz finds significance in the statute's use of singular syntax – "principal place of business" rather than "principal places of business," arguing this precludes examining (and aggregating) multiple "places of business." Pet. Brief 17. Hertz errs for at least two reasons.

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[7] Under Hertz's logic, use of the word "where" would require the court to determine *the specific location within the State* which houses the majority of employees, rather than counting the total number of employees in the State. But, of course, this renders the statutory language an absurdity.

First, Hertz ignores that, in the context of § 1332(c), "place of business" is a term of art meaning something broader than a corporation's individual office or plant. As discussed in Section II.A *infra*, the term was taken from bankruptcy law and had a long history of usage.

Second, given the Congressional debates, there was a good reason for using the singular form of "place." Congress followed the Judicial Conference Committee's rejection of a proposal to have corporations deemed citizens of every state in which they were doing business. S. Rep. No. 85-1830, at 3111-3112, 3119. Use of the word "place" clarified that, no matter how widespread its national operations, a corporation can have only one "principal place of business."

Finally, Hertz lists a series of federal statutes using the phrase "place of business" and observes that a number of those statutes make sense only if the phrase refers to a particular location, rather than a State as a whole. Pet. Brief 18. True, so far as it goes. But this statutory usage proves nothing about what the phrase "principal place of business" was intended to mean in 1958 in the context of limiting diversity jurisdiction.

II. SECTION 1332's LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS NEVER INTENDED TO MAKE A CORPORATION'S "PRINCIPAL PLACE OF BUSINESS" CO-EXTENSIVE WITH THE MERE LOCATION OF ITS CORPORATE HEADQUARTERS.

A. Section 1332's legislative history demonstrates that Congress rejected any bright line test in favor of a long-established test that focuses on business realities.

Congress enacted the 1958 amendment to Section 1332 to prevent the "evil" whereby "a local business" that chose (for any variety of reasons) to be incorporated in a different State had the option of choosing a federal rather than local court solely for that reason. S. Rep. No. 85-1830. Congress recognized that laws governing incorporation are:

> . . . not intended for the prime purpose ***of doing business*** in the foreign state. It appears neither fair nor proper for such a corporation to avoid trial in the state where it has ***its principal place of business*** by resorting to a legal device not available to the individual citizen.

Id. at 3102 (emphasis added).

Congress, therefore, wanted to make corporations citizens of both their States of incorporation and, in addition, the State in which they actually were doing the bulk of their business. The language Congress chose to define this latter jurisdiction was that State

in which the corporation had "its principal place of business." *Id.*

The question, thus, is what did Congress mean in adopting the phrase "principal place of business" as its proxy for the concept of defining where a corporation could be said to be "doing business." Did it, as Hertz insists, intend a bright line test considering only the location of the corporation's "headquarters," or did it intend a more fact-based analysis of where the corporation actually carries on its business? Section 1332(c)'s legislative history demonstrates that Congress eschewed the suggested bright line tests for determining corporate citizenship in diversity cases.

In 1958, the Senate Committee on the Judiciary largely adopted the recommendations made by the Committee on the Jurisdiction and Venue of the District Courts of the United States ("Jurisdiction Committee"), a blue ribbon panel of federal judges commissioned to make recommendations to reduce a post-World War II surge in diversity cases. S. Rep. No. 85-1830, at 3100-101, 3136 n.2. Before settling upon the "principal place of business" language, Congress had already considered – and rejected – both a proposal to disqualify a corporation for diversity citizenship purposes in every State in which the corporation did business (S. Rep. No. 85-1830, at 3119) and a proposal to deem a corporation a citizen of the State in which it receives more than half of its gross business income (*id.* at 3120, 3132).

The initially rejected proposal (deeming a corporation a citizen of each State in which it did business) would have been quite easy to apply. Likewise, the second rejected proposal (corporate citizenship based on the state where over half of gross business income derived) would have left little room for uncertainty. As the Jurisdiction Committee observed, "difficulties of proof on this score will be rare, for in the case of the average business the facts will be clear. . . ." S. Rep. No. 85-1830, at 3120.

Each of the rejected proposals would have instituted an easy-to-administer bright line test. But that was not Congress's priority. Instead of any easy-to-administer test, Congress adopted a "principal place of business" test because such a proposal:

> has a precedent in the jurisdictional provisions of the Bankruptcy Act (U.S.C., Title 11, Sec.11) and so provides a *more familiar criterion*, while at the same time preserving the purpose of our previous recommendations to prevent frauds and abuses of the federal jurisdiction by corporations which are primarily local in character.

S. Rep. No. 85-1830, at 3132 (emphasis added).[8]

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[8] *Accord, Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary,* 85th Cong. ("House Judiciary Hearings"), at 8 (remarks of Rep. Thomas Ludlow Ashley, proponent of the bill with the ultimately adopted language).

As explained in S. Rep. No. 85-1830, there is "ample precedent in the decisions of our courts and in federal statutes such as the provisions of the Bankruptcy Act [11 U.S.C. § 11]. There is thus provided sufficient criteria to guide courts in future litigation under this bill." *Id.* at 3102.

Consideration of that "ample precedent" confirms that the term "principal place of business" was not a mere shorthand for a company's headquarters; rather, it was a term calling for an examination of the breadth of corporate activity. A scholarly review of the pre-1958 bankruptcy venue precedents that was conducted by a district court judge shortly after passage of the 1958 amendments illustrates this point. *Gilardi,* 189 F. Supp. at 86-87. The judge concluded that most cases construing "principal place of business" under the Bankruptcy Act "are in accord that this finding always has been determined by an analysis of the totality of corporate activity rather than the mere determination of the location of executive offices." *Id.*

An often cited case on this issue is *Continental Coal Corp. v. Roszelle Bros.,* 242 F. 243 (6th Cir. 1917) ("*Continental Coal*"). It established that "principal place of business" for bankruptcy venue purposes depended upon a factual examination of numerous circumstances in each case. *Id.* at 246. There, the Sixth Circuit Court of Appeals, adopting an operations-based test, found that the bankrupt company's extensive mining operations in Kentucky

determined its "principal place of business," not the location of the company's principal office in Tennessee. *Id.* at 247.[9]

In the years preceding 1958, other bankruptcy decisions largely followed the lead of *Continental Coal*'s operations-based test. *See, e.g., In re Pusey & Jones Co.*, 286 F. 88, 94-96, 98 (2d Cir. 1922), *cert. denied*, 261 U.S. 263 (1923) (majority adopted special master's operations-based test emphasizing "the idea of physical presence" and rejected headquarters test where operations were concentrated elsewhere); *Lawrence v. Atl. Paper & Pulp Corp.*, 298 F. 246, 248-49 (5th Cir.), *cert. denied*, 266 U.S. 606 (1924) (bankrupt's principal place of business was in Georgia, the location of its manufacturing operations and property, rather than New York situs of principal business office where corporate meetings were held); *Dryden v. Ranger Ref. & Pipe Line Co.*, 280 F. 257, 258, 263 (5th Cir.), *cert. denied*, 260 U.S. 726 (1922) (bankrupt's principal place of business was located where corporation carried on business and dealt with customers, not where it had its general office where internal management was carried on); *In re Evans*, 12 F. Supp. 953, 954-56 (W.D.N.Y. 1935) ("no definite rule" for determining principal place of business;

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[9] In reaching this conclusion, the court considered and weighed various factors including: (1) the location of the bankrupt's extensive mining operations; (2) where the bulk of the company's property was situated; and (3) where its superintendents and managers actually resided. *Id.*

"each case necessarily is sui generis;" principal place of business determined by looking at locations of business transactions and creditors even though bankrupt moved around); *In re Monarch Oil Corp.*, 272 F. 524, 526 (S.D. Ohio 1920) (bankruptcy venue proper where bankrupt corporation owned oil wells and engaged in oil production in Kentucky, rather than Ohio situs of its corporate offices).

Two of these decisions articulated why bankruptcy doctrine looked to the locus of operations, rather than the corporate headquarters alone, as the corporation's "principal place of business." Both recognized that focusing upon operations/physical presence factors made sense. For example, *Monarch Oil* explained why it rejected a corporate headquarters test:

> If the principal place of business of this corporation was in [the location of the corporate offices] it must be that whenever the affairs of a corporation, no matter how large they may be, pass into the hands of a receiver and manager appointed in the state where its real business is carried on, its principal place of business shifts to the meeting room of its stockholders, directors and officers, *however remote* from the *real scene of its activities*, the place where its assets to be administered and creditors to be protected are to be found.

272 F. at 526 (emphasis added); *see also Dryden*, *supra*, 280 F. at 259-60.

B. The weight of the case law and the full text of the Maris testimony support the conclusion that Congress did not intend a narrow headquarters test.

1. Hertz's reliance on one phrase from Judge Maris's testimony is unpersuasive.

Hertz concedes that Congress took the "principal place of business" formulation from the Bankruptcy Act of 1898. Pet. Brief 4. It then claims, however, that "Congress *was informed* that the bankruptcy courts applied a *headquarters test* in situations involving a corporation conducting business 'in several States.'" *Id.* at 51 (citing House Judiciary Hearings at 37) (remarks of former Circuit Judge Maris); *accord* Pet. Brief at 4-5.

Given Hertz's implication that Congress believed it was adopting a "headquarters test," consider what Judge Maris actually said in context during the House Judiciary Hearing. During his testimony, Judge Maris stated that: (1) the "principal place of business" language was intended to create the "same test as a basis for jurisdiction in a bankruptcy court;" (2) there were "a *large number of cases in the books* which construe just what that means, what is the principal place, and what is not the principal place of business of a corporation"; and (3) "by using that language we will have a *well understood phrase*, and you *have cases* which will help the courts to apply it." House Judiciary Hearings at 36 (emphasis added). A legislator then asked about how the proposed test

would be applied to corporations with production and actual activities in "some several States." Judge Maris responded:

> Yes; that is just why the Committee and the Conference have suggested the use of this term which has been defined in the Bankruptcy Act. All of those problems have arisen in bankruptcy cases, *and as I recall the cases and I wouldn't want to be bound by this statement because I haven't them before me,* I think the courts have generally taken the view that where a corporation's interests are rather widespread, the principal place of business is an actual rather than a theoretical or legal one. It is the actual place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made, and not necessarily a State in which it may have a plant, if it is a big corporation, or something of that sort.
>
> *But that has been pretty well worked out in the bankruptcy cases, and that law would all be available, you see, to be applied here without having to go over it again from the beginning.*

Id. at 37 (emphasis added).

Congress could hardly have relied on Judge Maris's alleged characterization of what the existing bankruptcy law held, given his own express

declaration that he "wouldn't want to be bound" by his recall of the case law. Judge Maris was unequivocally clear that the principal place of business language in the amended diversity statute was to be controlled by the principles that had already "been pretty well worked out in the bankruptcy cases, and that law would all be available, you see, to be applied here. . . ." *Id.*

Hertz's other argument based on Judge Maris's testimony is also incorrect. Hertz asserts that Congress "rejected" prior proposals (*e.g.*, the initial proposal that a corporation would be a citizen of any state in which it transacted business) after "being informed that corporations continued to rely on access to federal courts 'in States remote from their headquarters,' because of the perceived potential for local bias in non-headquarters States." Pet. Brief 3, citing House Judiciary Hearings at 35-36. But what really occurred is that a legislator asked Judge Maris if people representing corporations would feel handicapped if they could not litigate in the federal courts and Judge Maris responded: "These gentlemen, as I have talked to them, seem to regard pretty highly their privilege of taking their litigation into the Federal courts in States remote from their headquarters *where* they don't know the local people. . . ." House Judiciary Hearings at 35-36 (emphasis added). Read in context, this floor debate exchange only related to how corporations felt about being denied access to federal courts in every State in which they did even the slightest amount of business.

In that sense, they understandably feared the danger of local bias and preferred access to federal courts. But none of this was discussed in the context of delimiting what the phrase "principal place of business" should mean. Nor does it suggest that in States where the corporation has a sizeable presence, the controlling factor should be where the corporate headquarters happen to be located (as opposed to where the predominant amount of the corporation's actual business dealings occur).

Indeed, Hertz's example of Boeing forcefully illustrates this point. Although Boeing moved its formal headquarters to Illinois, no one would suggest that given Boeing's sizable presence in Washington – a place where it certainly does "know the local people" and vice-versa – there would be a justification to treat it as a foreigner in Washington in need of diversity protection. *See* Section II.C *infra,* comparing Boeing's operations in Illinois to its operations in Washington.

2. Hertz's treatment of the phrase "simple in application" does not reflect Congressional intent.

After stating that Congress was told that the "principal place of business" test would focus on where the corporation's "officers carry on its day-to-day business, where its accounts are kept, where its payments are made" (House Judiciary Hearings at 37), Hertz then asserts Congress was "informed that the 'principal place of business' test would be 'simple

in application.'" Pet. Brief 4-5 (citing to Letter from Elmore Whitehurst ("Whitehurst letter")). The implication is that "simple in application" is a shorthand for Hertz's proffered bright line test.

The proper context of the "simple in application" concept is revealed in the Senate Committee Report that quotes the same Whitehurst letter. After that letter noted that the "principal place of business" test "has a precedent in the jurisdictional provisions of the Bankruptcy Act (U.S.C., Title 11, Sec. 11) and would be simple in application" it continued "while at the same time would prevent frauds and abuses of the federal jurisdiction by corporations primarily local in character." S. Rep. No. 85-1830, at 3107.

Two points are apparent. First, the focus on the existence of a developed body of Bankruptcy Act case law simply underscores what others had said, *e.g.*, that there was "familiar" and "ample precedent" and there exists "this sufficient criteria to guide courts" in construing the amended diversity statute. S. Rep. No. 85-1830, at 3102, 3132. It was in this context (existing bankruptcy precedent) that the "principal place of business" test was described as "simple in application." This has nothing to do with Hertz's bright line contentions. Indeed, it is inconsistent with them to the degree that Congress elected to use the phrase "principal place of business" when it could have instead easily used bright line language (such as "corporate headquarters") had it so desired.

Second, the Whitehurst letter stresses that use of the "principal place of business" test was intended to further the Congressional purpose of preventing "frauds and abuses of the federal jurisdiction by corporations primarily local in character." S. Rep. No. 85-1830, at 3107. To the degree corporations can more easily change their official headquarters locations (*e.g.*, by opening a skeletal office in a desired state) than they can change the totality of where they actually perform their business activities, Hertz's bright line test would lend itself to the type of abuse the amendment was intended to cure. *See* Section II.C, *infra*; *Gilardi,* 189 F. Supp. at 88 ("To equate principal place of business to executive offices would not only do injustice to defendants, but would run the risk of creating a substitute fiction for the fiction of charter citizenship").

3. The existing bankruptcy precedent supports the use of a broad, fact-based analysis to determine a corporation's "principal place of business."

Although more than one approach to ascertain the "principal place of business" was developed under pre-1958 bankruptcy law, the majority view employed a fact-based analysis of where the corporation actually does most of its business rather than a one-factor "headquarters" test, to make the determination. *See Gilardi*, 189 F. Supp. at 86-87 ("Some of the Federal Courts have found the principal place of

business to be the place where executive officers reside and maintain an office. But this has never been the sole criterion and other decisions greatly minimize the location of executive offices.") (internal citations omitted).

Hertz argues that, because of the "varying tests" applied by the courts, "the actual experience under" the pre-1958 bankruptcy law "sheds little light" on Congress's intent with respect to the definition of a corporation's "principal place of business." Pet. Brief 50. However, as discussed above, the Congressional debates showed that the phrase "principal place of business" was selected *precisely because* it carried:

> ample precedent in the decisions of our courts and in federal statute such as the provisions of the Bankruptcy Act [11 U.S.C. § 11]. There is *thus* provided *sufficient criteria to guide* courts in future litigation under this bill."

S. Rep. No. 85-1830, at 3102 (emphasis added). The "criteria" that was intended to provide guidance in future litigation was the existing body of bankruptcy case law construing the identical term. Many of those cases had engaged in an analysis of multiple factors in determining a corporation's "principal place of business" rather than simply deferring to the location of corporate headquarters.

Hertz cites *Burdick v. Dillon,* 144 F. 737 (1st Cir. 1906), *appeal dism. per stipulation,* 205 U.S. 550 (1907), as the prime bankruptcy venue decision

holding that the "principal office" is the principal place of business. Pet. Brief 50 n.5. However, *Burdick* did not merely apply a rote "headquarters address" test, but rather looked at that factor in addition to the company's selling agency location, the place from where the bulk of sales was negotiated, and the situs of where bills were sent and payments received. *Burdick,* 144 F. at 737-38. In fact, courts have read *Burdick* as actually supporting a comparative analysis of the corporation's activities at each place in relation to their character, importance, and amount. *See, e.g., In re Worcester Footwear Co.,* 251 F. 760, 762 (D. Mass. 1918).

In any event, when examined as part of the larger body of pre-1958 bankruptcy law, *Burdick* does not offset the many cases that held a broader, fact-based analysis is required (exemplified by *Continental Coal*). Indeed, as discussed above, shortly after passage of the 1958 amendments, a district court judge conducted a scholarly review of the pre-1958 bankruptcy venue precedents in *Gilardi, supra,* and concluded that *most cases* construing "principal place of business" under the Bankruptcy Act "are in accord that this finding always has been determined by an analysis of the totality of corporate activity rather than the mere determination of the location of executive offices." *Inland Rubber Corp. v. Triple A Tire Serv. Inc.,* 220 F. Supp. 490 (S.D.N.Y. 1963);[10] *see*

[10] *Inland Rubber* reached three conclusions: (1) "the locus of corporate operations [is] a more important factor than the locus

(Continued on following page)

also J.A. Olson Co. v. City of Winona, 818 F.2d 401, 405-06 (5th Cir. 1987) ("from these representative cases interpreting the 'principal place of business' language of the Bankruptcy Act, we draw this lesson applicable to the question before us today: the principal place of business is a fact question that follows no single inflexible test dependent solely upon the situs of the nerve center or upon the situs of activities of the corporation").

Thus, the majority of pre-1958 case law establishes that the determination of a corporation's "principal place of business" involves an analysis of the corporation's activity as a whole. As illustrated by the debate quoted above, Congress recognized the importance of such analysis when it embraced that long-used phrase.

Hertz claims that Frank O. Loveland's bankruptcy treatise supports a "headquarters" test. In particular, it quotes this sentence: "'[t]he principal place of business of a corporation is usually where the general offices or headquarters are located without regard to the *place named in the charter.*'" Pet. Brief

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of over-all policy direction or control in determining the 'principal place of business' of a corporation" (*id.* at 492); (2) the Senate Judiciary Committee envisioned a test based chiefly on operations, since it is by visible presence that a corporation will become popularly recognized as domestic rather than foreign in nature (*id.* at 495); and (3) "the legislative history of Section 1332(c) suggests by far the dominant emphasis should be placed on the locus of the operations of the corporation." (*id.* at 496).

50 n.5 (emphasis added). This statement has nothing to do with the issue before this Court – whether the headquarters' location trumps all other factors concerning where the entity actually does business. Respondents fully agree with Loveland that, as between the mere state of incorporation and where the headquarters are located, the latter is a more significant indicator of where the corporation's principal place of business exists. Indeed, that is largely why the 1958 amendment was adopted. But Hertz's red herring argument has no bearing on the real issue before this Court.

Moreover, Loveland's treatise actually hurts Hertz's position. For example, it states that a corporation's principal place of business is where business "is actually done" and is "a question of fact to be determined by the circumstances in each particular case." 1 Frank O. Loveland, *A Treatise on the Law and Proceedings in Bankruptcy* 404 (4th ed. 1912).

Finally, we note the inherent inconsistency in Hertz's argument. Assuming *arguendo* that, as Hertz argues, the bankruptcy law was split and really did not "shed light" on the issue, it becomes even clearer that Congress did *not intend* to adopt the bright line headquarters test that Hertz advocates. If Congress really had wanted to impose a bright line test, it would not have selected a phrase which, according to Hertz, was subject to such differing interpretations. It would, instead, have used an unmistakably clear phrase such as "where the corporation's headquarters are located."

C. Hertz's headquarters test does not address the evil targeted by the 1958 amendment.

As discussed, a primary reason for inclusion of the "principal place of business" language was Congress's desire to prevent abuse of the diversity statute under which a company could incorporate in a state that had no connection to its business operations. Pet. Brief 3-4. The Senate Committee Report explained that it was "common knowledge" that the state of incorporation was primarily selected either to obtain tax benefits or other benefits of the foreign state's corporation laws and not "for the prime purpose of doing business in the foreign state." S. Rep. No. 85-1830, at 3102. The report concluded:

> It appears neither fair nor proper for such a corporation to avoid trial in the state where it has its principal place of business by resorting to a legal device not available to the individual citizen.

Id.

The same potential for abuse or unfairness would also exist if a bright line "headquarters" test were recognized here. Empirical research (as well as an examination of Hertz's citation of Boeing's experience) confirms that adoption of a "headquarters" test would result in abuses akin to those which gave rise to the 1958 amendments to § 1332(c).

Both Hertz and its *amici* claim that most corporations have rather static or stable headquarters locations. Pet. Brief 43; *Amici* Brief 21-22. Contrary to those suggestions, however, a recent study of a much more comprehensive nature confirms that corporations move their headquarters with some regularity often for economic reasons similar to the selection of place of incorporation. Vanessa Strauss-Kahn & Xavier Vives, *Why and where do headquarters move?*, 39 Regional Science & Urban Economics 168, 170-71 (2009) ("Strauss-Kahn/Vives Study").

Using a unique firm-level database of 26,195 U.S. headquarters for firms in 276 U.S. metropolitan areas for the 1996-2001 period,[11] that study's conclusions

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[11] The definition of "headquarters" used by this study is significantly broader than that contemplated by the parties to this case and the case law interpreting "principal place of business." Thus, the statistics cited, while the best available, may be overstated.

By contrast, however, Hertz selectively focused on the Fortune "top 50" firms, an extremely narrow sampling that pales next to the (26,195 U.S. firms) used in the Strauss-Kahn/Vives Study. Beyond that, Hertz engages in no scientifically acceptable sampling techniques, but simply made a crude extrapolation based on data in *Fortune* magazine. Pet. Brief 43. *Amici*, in turn, simply relied on episodic experiences. *Amici* Brief 21-22. However, even if the sampling is narrowed to the 500 largest U.S. headquarters in 1996, 36 moved between 1996 and 2001, or 7.2% every five years – far more than the Boeing relocation cited by Hertz. Strauss-Kahn/Vives Study at 172, 182 & Table A7.

differed starkly from those advanced by Hertz or its *Amici* (who had relied upon an inferior sampling):

- U.S. headquarters relocate a *significant* 5% a year, which over a decade, translates to a 50% relocation rate time frame (Strauss-Kahn/Vives Study at 168, 172 & Table 2);
- Firms with larger sales, young firms, large firms measured in terms of numbers of headquarters, foreign firms, and firms surviving from mergers tend to relocate more often (*id.* at 168-69);
- Headquarters of U.S. multi-site firms (80% of the studied database of 26,195 in U.S. firms) are *typically disconnected* from production sites (*id.* at 170); and
- Economic factors unrelated to operations/production of a firm (*e.g.*, low corporate taxes) are the main reasons for relocating headquarters (*id.* at 168, 169, 176-79).

The Strauss-Kahn/Vives Study confirms that the rate of headquarter relocations of U.S. firms is significant. *Id.* at 168. Moreover, when the study was conducted, the vast majority of the courts applied fact-based tests to determine "principal places of business" rather than the Seventh Circuit's headquarters test. If, however, this Court were to embrace the Seventh Circuit test, corporations in all the other circuits – that had no incentive to move their headquarters for strategic reasons relating to diversity

– would now have such an incentive. Therefore, the already significant number of relocations would presumably increase significantly.

Hertz asserts that the possibility of a "strategic move" to avoid the courts of a particular state "also exists under the Ninth Circuit's test." Pet. Brief 49. Without citation to authority for this point, Hertz asserts that undefined "accounting mechanisms" or "marketing" changes could somehow affect the state where a corporation has the substantial predominance of its business activities. *Id.* Assuming *arguendo* that were true, it plainly is far easier to relocate an official headquarters (*e.g.*, given the existence of "virtual" offices, Cayman Island mail-drops, or similar devices) than moving (or seeming to move) the locus of the corporation's actual, daily operations.

Hertz also insists that relocation of corporate headquarters is difficult because it would allegedly require relocation of the "physical location of its office, its tangible property, and its books and records." Pet. Brief 48. But this is not so. Nothing requires that a "headquarters" contain a corporation's "books and records," most of its "tangible property," or any of its real property. Indeed, Hertz's own experience amply illustrates this. Although Hertz stated that its "corporate headquarters" are in New Jersey, its supporting evidentiary showing asserted that its "core executive and administrative functions" are "carried out in New Jersey and Oklahoma." Pet. App. 29a-30a. Thus, it is unclear whether "records," "tangible

property" or other indicia are the *sine qua non* of a corporate "headquarters."

Hertz cites Boeing's experience as an example of a headquarters relocation that somehow supports its position that such relocations are overwhelmingly difficult and undesirable to undergo. Pet. Brief 49. But, the example of Boeing actually buttresses Respondents' contention that a headquarters test is too mechanical, and will lead to unfair results in determining a corporation's principal place of business. Boeing relocated to Illinois because it was offered more than $50 million in potential incentives to relocate. Strauss-Kahn/Vives Study at 169. An examination of Boeing's circumstances show why it would be unfair to view it as a "citizen" of Illinois for diversity purposes based on the relocation of its headquarters to Chicago.

According to its website, as of August 31, 2009, Boeing employed 159,094 people, 73,637 of whom work in Washington State, with the next highest employee count being in California with 25,373. http://www.boeing.com/employment/employment_table.html. According to Hertz, Boeing relocated as many as 500 employees to its new Chicago headquarters in 2001. Pet. Brief 49. While Boeing's website does not reveal its number of employees in Illinois today, assuming that the number has remained constant over time, 500 employees would amount to less than one half of one percent of its work force. Further, Boeing's website reveals that its factory in Mukilteo, Washington is the world's largest building (by

volume) and is where Boeing builds all but one model of its commercial aircrafts. http://www.boeing.com/commercial/tours/index.html.

Given that Boeing's vast operations and strong presence remained in Washington, changing its headquarter's address to Chicago does not justify treating it as a "foreigner" in Washington.[12] Moreover, a corporation is more likely to have its greatest contacts with the public at its place of operations, through activities such as the employment of personnel, purchasing of materials, and sales of goods and services. These dealings *increase local familiarity with the corporation* and accordingly *warrant considering* the entity as a "citizen" of that state, without concern for the possible danger of local prejudice against outsiders. 13F Charles Allan Wright & Arthur B. Miller, Federal Practice & Procedure, Jurisdiction and Related Matters § 3625 (3d ed. 2009) at 114 (citation omitted) (emphasis added).

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[12] Indeed, even after relocating its "headquarters" to Chicago, Boeing itself has asserted to at least one federal court that its principal place of business was in Washington State. *Aspley v. Boeing Co.*, 2008 WL 191418 (D. Kan. Jan. 22, 2008) at *3 (Boeing succeeded in quashing a deposition in Kansas by "assert[ing] that Seattle, Washington is its principal place of business and location of the witness; thus, the deposition should take place in Seattle").

III. HERTZ'S "SIMPLICITY" ARGUMENT AND ITS OTHER PUBLIC POLICY ARGUMENTS FAIL.

Hertz devotes much energy to describing how allegedly difficult and unworkable the Ninth Circuit's test is. *See, e.g.*, Pet. Brief 31. It then asserts that its proposed test demonstrates its purported simplicity. *Id.* at 30.

Before addressing this argument, the following overriding propositions must be noted:

- Because nothing in the 1958 amendment states (or suggests) that Congress placed a priority on simplicity, Hertz's stress on that factor invites this Court to ignore the plain language of the statute and Congressional intent.
- Hertz's insistence that "jurisdictional rules" must be easily administered is not true. There are many examples of threshold jurisdictional issues which require careful factual analysis, often aided by discovery rights.

A. District courts are frequently required to apply complicated, fact-intensive jurisdictional tests at the outset of a case.

Hertz repeatedly asserts that this Court's precedents "require jurisdictional rules to be clear and easily administered." Pet. Brief 26; *accord*, *id.* at

34, 39. However, both Supreme Court precedent and Congressional actions fully rebut Hertz's assertion. Indeed, that the business realities test proposed by Respondents might require fact-intensive analysis is not a reason to assume Congress did not mean to adopt it. Congress has often imposed similar – or indeed more complicated – fact-based inquiries which must be addressed early in litigation. Such inquiries include citizenship/domicile, personal jurisdiction, standing, and federal jurisdiction under CAFA.

1. Citizenship/Domicile.

For purposes of diversity jurisdiction, district courts must determine the citizenship of natural persons. This requires a complicated and fact-intensive inquiry as to that person's "domicile," often at the very beginning of a case. *See Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698, 701 (1st Cir. 1979). Though the test of a person's "domicile" (citizenship) is at least as fact-intensive as Hertz claims the "place of operations" test is, this Court has approved that process for at least a century. *See, e.g., Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 383 (1904).

In assigning a person's domicile, "two things are indispensable: first, residence in a new domicile; and second, the intention to remain there." *Sun*, 194 U.S. at 383. The "intention to remain" inquiry is both arduous and fact-specific because there are "many factors which should be considered." *Acridge v. Evangelical Lutheran Good Samaritan Soc'y*, 334

F.3d 444, 448 (5th Cir. 2003). If a person's citizenship is challenged, the court must evaluate a range of factors including where the litigant exercises civil and political rights, pays taxes, owns real and personal property, has various licenses, maintains accounts, belongs to clubs and churches, has places of business or employment, maintains membership in unions and other organizations, and maintains a family home. *Coury v. Prot*, 85 F.3d 244, 251 (5th Cir. 1996); *McCann v. George W. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006).

In considering these numerous factors, no single one "is determinative." *Acridge*, 334 F.3d at 448. Therefore, the court must exercise its discretion if some factors point to different States.

2. Personal jurisdiction.

Early in litigation, a district court must determine whether it has *in personam* jurisdiction over a foreign corporation. Under *International Shoe Co. v. Washington*, 326 U.S. 310, 317-20 (1945), this is an uncertain and fact-specific inquiry. Contrary to Hertz's claims that "jurisdictional rules" must be "clear and easily administered," *International Shoe* held that no bright line test applies to personal jurisdiction determinations:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a

> corporation to suit, and those which do not, cannot be simply mechanical or quantitative.

Id. at 319.

This Court has created jurisdictional tests that require district courts not only to find facts, but to use their discretion to apply those facts – all at the outset of a case. In addition, the fact-driven inquiry for personal jurisdiction could yield differing determinations as to whether a single corporation is subject to suit in federal court depending on the specific circumstances of each case: "The application of that rule will vary with the quality and nature of the defendant's activity[.]" *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

For decades, circuit courts have approved the use of discovery to determine facts relevant to personal jurisdiction. *See, e.g., Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) (citing a long list of cases from various circuits supporting jurisdictional discovery). While Hertz may characterize the personal jurisdiction inquiry as "complicated and unpredictable," and discovery into jurisdictional facts as "wasteful litigation" (Pet. Brief 26), it is one that has stood the test of time and met this Court's repeated approval. Hertz's suggestion that the alleged need for a "simple" rule should supplant Congress's intent because of alleged difficulties or expense of determining where a corporation's actual "principal place of business" is located should be rejected.

3. Standing.

This Court has required district courts to apply intricate, fact-intensive tests for determining standing, another issue that often arises at the beginning of a case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992), laid out the requirements, developed over decades, to determine if a party has standing. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* at 560. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 560-61 (citations omitted).

The standing inquiry requires many subjective determinations left to the district courts' discretion, such as deciding whether an injury is "concrete" rather than "conjectural," or whether redress is "likely" rather than "speculative." The answers to these (and related) questions may require extensive discovery.

4. CAFA confirms that accuracy trumps simplicity in making jurisdictional determinations.

CAFA sheds light on the interpretation of "principal place of business" in two respects: it shows that Congress intended: (i) a factually enmeshed evaluation of jurisdictional requirements, and (ii) that local controversies (as determined using the long-standing "principal place of business" test for corporations) would not be foisted on the federal dockets.

a. CAFA creates a remarkably complex factual test for determining jurisdiction.

Hertz's argument that jurisdictional evaluation requires simple, bright line tests, is disproven by CAFA itself. CAFA creates a factually complex scheme for determining jurisdiction. Chief among these facts, the court is required to determine the citizenship of all putative class members – potentially thousands or millions of members, who would be evaluated under the "domicile" test (Section III.A.1 *supra*),[13] and every defendant at the time of removal. 28 U.S.C. § 1332(d). Once those facts are determined, the court must engage in a rigorous analysis requiring complex factual findings (shown by the bold type below) pursuant to which:

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[13] Unless the class member was a corporation.

- It must decline jurisdiction if: (1) more than ***two-thirds of the class*** are citizens of the state where the action was originally filed and at least one defendant, who is a citizen of that state, is someone from whom plaintiffs seek "***significant relief***" and is alleged to have engaged in "***conduct [that] forms a significant basis***" of plaintiffs' claims, and the "***principal injuries***" were incurred in that state, and ***no other similar class action*** has been filed against any of the defendants in the prior three years; or (2) ***two-thirds of the class*** and the "***primary defendants***" are citizens of the state where the action was filed. 28 U.S.C. § 1332(d)(4)

- It "***may, in the interests of justice and looking at the totality of the circumstances***" decline jurisdiction if: more than ***one-third*** but ***less than two-thirds*** of the class members and "***the primary defendants***" are citizens of the state where the action was filed. This determination is made by evaluating: (i) whether claims involve "***national or interstate interest***," (ii) ***which states laws will apply***, (iii) whether the case was plead to avoid federal jurisdiction, (iv) the "***nexus***" between the forum state, the class members, the alleged harm, and the defendants, (v) ***how the class members are disbursed among the states***, and (vi) whether any ***other similar class action*** has been

> filed against any of the defendants in the prior three years. 28 U.S.C. § 1332(d)(3).

It strains logic to suggest that, as part of this statutory scheme, properly ascertaining the "principal place of business" of a multistate corporation should not be subject to a factual evaluation based on business realities.

b. CAFA's requirement that local controversies remain in state court supports the business realities interpretation of "principal place of business."

CAFA seeks to insure that "local controversies" remain in state courts. *See* 28 U.S.C. §§ 1332(d)(3)-(5) (permitting or requiring federal courts to decline jurisdiction for local controversies). It is thus significant for two reasons that, in re-enacting § 1332 with CAFA's amendments, Congress left untouched § 1332(c)'s test for corporate citizenship, which applies to corporations equally regardless of whether the case is removed under CAFA or traditional diversity principles.[14]

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[14] This was intentional. *See* S. Rep. No. 109-14, at 36 (CAFA "does not alter current law" for determining citizenship, "including the provisions of 28 U.S.C. § 1332(c) specifying that 'a corporation shall be deemed to be a citizen of any State . . . where it has its principal place of business.")

First, it is a canon of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . [or] adopts a new law incorporating sections of a prior law[.]" *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). As shown above, prior to CAFA's enactment all but one circuit court interpreted "principal place of business" as requiring a fact-based comparative analysis.

Second, adopting a headquarters test could allow corporations the opportunity to thwart the Congressional determination that local controversies should not be litigated in federal court.[15] For example a retailer with all of its stores in California could locate its "headquarters" in Arizona and thus create federal jurisdiction for what clearly would be a local controversy between it and a class of customers, all of whom made their purchases in California.

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[15] *See* S. Rep. No. 109-14, at 27, 39 (explaining that CAFA provides a "narrowly-tailored expansion of federal diversity jurisdiction to ensure that class actions that are truly interstate in character are heard in federal court" while "leav[ing] in state court" class actions that involve "local controversies," because "state courts have a strong interest in adjudicating such disputes.").

B. Contrary to Hertz's assurance, there would be nothing "easy" in administering a "headquarters" test.

Had it desired to do so, Congress had ample opportunity to create any one of a number of easy-to-administer tests. For example, as earlier discussed, the two rejected tests discussed in Section II.A *supra*, would have satisfied that criterion. Congress's selection of the "principal place of business" language confirms that neither "simplicity" nor "ease-of-administration" was Congress's priority when it selected the test to use in limiting corporations' access to federal courts under the diversity statute.

Even if one assumes *arguendo* that such "ease" or "simplicity" is a valid goal for this Court to consider, Hertz's argument still fails because its proposed "headquarters" test is not nearly as simple and easily administered as Hertz proclaims. Indeed, if this Court were to adopt Hertz's proposed test, a series of questions would immediately arise about where a corporation's "headquarters" actually is. For example:

- Is the "headquarters" where the chief executive has his or her office, where the Board of Directors meets, or at some other place? What if the Board meets in various (rotating) States?
- Where would the "headquarters" be located if the chief executive's office is in one State, and other officers work in one or more other States?

- If the corporate books and records are kept in one State and the officers live in another, which State is the "headquarters"?
- How significant, if at all, is the place that the corporation identifies as its "headquarters" in public filings with either the government or the public? What if (as Hertz does) the corporation identifies more than one location as its major administrative offices (Pet. App. 7)?

Indeed, corporations often have multiple places they designate as "headquarters." For example, Boeing has designated its offices in Chicago as its "World Headquarters." "*Boeing Begins World Headquarters Operations in Chicago,*" available at http://www.boeing.com/news/releases/2001/q3/nr_010904z.htm. However, "Boeing Commercial Airplanes" which is a "business unit" of The Boeing Company, has its headquarters in Washington State. Overview available at http://www.boeing.com/companyoffices/aboutus/brief/commercial.html. Boeing has "headquarters" for several other units throughout the country. *See, e.g.*, "*Boeing Selects St. Louis for Headquarters of Major Military Program,*" available at http://www.boeing.com/defense-space/ic/fcs/bia/news/2003/q2/nr_030403m.html; "*Boeing to Move Missile Defense Division of Headquarters to Alabama,*" available at http://www.boeing.com/ids/network_space/news/2009/q2/090512a_nr.html.

Likewise, while the SEC disclosures of Bank of America list North Carolina as the location of the company's "principal executive offices" (*see* SEC Form 10-K filed 2/27/2009), the Bank also has a "New York Headquarters" which "serve[s] as the headquarters for Bank of America's operations in New York City, and house its global corporate and investment banking, wealth and investment management and consumer and commercial banking businesses." *See* "*Bank of America and the Drust Organization Break Ground on the Bank of America Tower at One Bryant Park in New York City,*" available at http://bankofamerica.mediaroom.com/index.php?s=43&item=4405.

Perhaps the best response to Hertz's argument is to point to two real world examples which directly affect Hertz and demonstrate the folly of describing a "headquarters" test as simple to administer.

The very decision which Hertz asks this Court to overrule, *Tosco Corp. v. Communities for a Better Environment,* 236 F.3d 495 (9th Cir. 2001) ("*Tosco*"), undercuts any claim that a "headquarters" test is simply administered. In that case, Tosco Corporation admitted it had *three* different headquarters. *See Tosco*, 236 F.3d at 502. According to Tosco Corporation, its "principal corporate headquarters" was in Stamford, Connecticut, its "refining company headquarters" was in Linden, New Jersey, and its

"marketing headquarters" was located in Phoenix, Arizona. *Id.*[16]

But Hertz's simplicity argument has even a greater barrier to overcome. By its own admission, Hertz's "major administrative offices" are not located solely in its alleged main headquarters in New Jersey, but also in Oklahoma and "[t]he core executive and administrative functions for Hertz and its domestic subsidiaries are carried out" in New Jersey and (allegedly "to a lesser extent")[17] in Oklahoma. Pet. App. 29a-30a.

Moreover, Hertz runs its entire reservations system through its Oklahoma City headquarters. This is critically important because Hertz argues that the "headquarters" is the "most important" place of business because "it bears responsibility for directing and controlling the corporation's activities at all business locations." Pet. Brief 21. But for a car-rental company, no location "controls" more activities than the reservations command center.

Therefore, identifying the location of Hertz's "headquarters" is no simpler than identifying where

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[16] The Ninth Circuit also noted the existence of a fourth "headquarters," Tosco's "lubricant company headquarters" was located in Costa Mesa, California. *Id.*

[17] No discovery was undertaken concerning the assertions in Hertz's declaration, so the degree to which this statement about "to a lesser extent" may be exaggerated or subject to contradiction is unknown.

Hertz conducts the predominance of its actual business, *i.e.*, California.

IV. NEITHER HERTZ'S "NARROW EXCEPTION" NOR ITS PROPOSED "PER CAPITA" ADJUSTMENT CAN BE JUSTIFIED.

A. Hertz's "narrow exception" is both illogical and easily circumvented.

Implicitly recognizing how easily its "headquarters test" can be abused (or that it is an inaccurate reflection of a corporation's true "principal place of business"), Hertz argues that there could be – although there should not be – a "narrow exception" to its bright line proposal: an exception "confined to situations involving a corporation that performs *all* of its business activity in one State, with the exception of the business activity conducted at its headquarters site in a different State." Pet. Brief 54 (emphasis added).

Simply verbalizing the proposed exception demonstrates how illusory it is. Any corporation seeking to escape the "exception" and benefit from Hertz's unmitigated "headquarters test" need do no more than open a skeletal sales office (or other location doing "non-headquarters" business activity) in a different state than where the remaining 99% of business activity is performed. Moreover, Hertz never suggests why business operations should be 100% in a single state before the exception can operate.

Another problem with Hertz's proposed "narrow exception" is that neither the wording of the statute nor its legislative intent supports recognition of this strategically-driven exception. There is no principled reason why the exception should be limited by the artificial (and illogical) 100% rule. In fact, as discussed above, Congress specifically rejected another "bright line" rule (*i.e.*, deeming a corporation a citizen of a state from which it receives 50% of its revenue). *See* Section II.A *supra*. Like that rule, once that 100% rule is abandoned, the inescapable conclusion is that Congress intended that the courts undertake a factual balancing that necessarily entails a fact-based inquiry which Hertz insists is so untenable.

In short, Hertz's proposed "fix" actually fixes nothing. Rather, it underscores the futility of attempting to divorce a "principal place of business" test from the inherently factual determination of where the corporation actually performs its business operations. *See, e.g.*, *Soliman*, 506 U.S. at 175-76 ("In determining the proper test for deciding whether a home office is the principal place of business, we cannot develop an objective formula that yields a clear answer in every case. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case").

B. Hertz's proffered "per capita" test would actually prevent large states from enforcing their own laws in their own courts.

As Hertz notes, after this case was decided, the Ninth Circuit issued *Davis v. HSBC Bank Nev., N.A.*, 557 F.3d 1026 (9th Cir. 2009), recognizing that for the purposes of diversity jurisdiction, a national retailer "will not be a citizen of California merely because its operations in California cater to California's larger population." *Id.* at 1030. *Davis* was careful to underscore that its holding does not require courts to apply a per capita approach to determining a corporation's principal place of business in every case. *Id.*

Hertz argues that if its headquarters test is rejected, any business operations test must be based on a per capita analysis rather than using actual gross statistics. However, the per capita test does not accurately identify the "principal place of business" of a company. A simple hypothetical illustrates the reason that the state's size does not matter in making the determination, and can actually distort the resulting determination. For example, California, the largest state, contains 11.95% of the country's population, while Wyoming, the smallest, contains 0.17%. Even if Hertz did 98% of its business in California and 2% of its business in Wyoming, Wyoming would be considered Hertz's "principal place of business" under the per capita approach, because Hertz would be doing much more business per capita in Wyoming than in California.

Not only does the per capita test risk distorting the evaluation of a business's principal place of business, the per capita approach would unjustifiably prevent large States from enforcing their own laws through their own courts. Diversity jurisdiction was not designed to allow a major California employer such as Hertz to profit from California's large economy and then, for purposes of removal, avoid the jurisdiction of California's courts when its labor practices in California are challenged under California law. Rather it was designed to "provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries." S. Rep. No. 85-1830, at 3102. It can hardly be said that a company that has 20.5% of its employees in California, 273 rental locations (17% of its tangible property) at which it rented over 3.8 million cars, and in a single year earned $811 million (18.6% of its total revenue) could be considered "foreign" to either California courts or juries.

CONCLUSION

Respondents respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Hertz's national headquarters is located at 225 Brae Boulevard, Park Ridge, New Jersey. From that location, Hertz's executive officers direct and control the company's operations in 44 States, including California. Under the ordinary meaning of the terms of the diversity statute, Hertz's "principal place of business" is its national headquarters, and "the State where it has its principal place of business" thus is New Jersey, not California. 28 U.S.C. § 1332(c)(1).

The terms of the diversity statute dictate that a corporation's "principal place of business" is its headquarters. That site is the corporation's most important, consequential, influential, and highest-ranking place of business—its "principal" place of business—because, from there, its chief executive officers direct and control the company's activities at all of its locations. While the statutory terms therefore call for an across-the-board headquarters rule for corporate citizenship, it is especially clear that a corporation's "principal place of business" is its headquarters where, as here, the company conducts business operations dispersed across multiple States.

In arguing otherwise, respondents endorse a highly amorphous, multi-stage, multi-factor balancing test under which, as respondents describe (Br. 4):

> a court must first determine whether there is a substantial predominance of a corporation's business activities in any one state, by comparing factors including [but not limited to] the location of employees, tangible property, production activities, sources of income, and where sales take place. If the court finds a

> substantial predominance, then that state is the principal place of business. If not, the court relies upon the state in which the corporation's nerve center is located.

Respondents' own description of their approach lays bare its complexity and uncertainty. That approach also assumes erroneously that a corporation's "principal place of business" is an entire "state" rather than a particular business situs within a State. And it fully ignores the site of—and significance of—the corporate headquarters unless the non-exhaustive list of other factors fails to demonstrate a "substantial predominance" of business activities in one State.

Respondents' approach cannot be reconciled with the ordinary meaning of the phrase "principal place of business"; it is needlessly complicated to administer; it contradicts ordinary tests of State citizenship; and it fails to promote the statutory purpose of protecting corporations from prejudice in places remote from their headquarters. While respondents suggest that tests applied by circuits other than the Ninth Circuit would support deeming Hertz a citizen of California rather than New Jersey, virtually all other circuits to address the issue would consider the principal place of business of a multistate corporation with dispersed operations to be its headquarters.

Respondents likewise err in relying on judicial experience under the bankruptcy venue statute from which Congress drew the phrase "principal place of business." The courts disagreed on the proper interpretation of that language in the bankruptcy venue statute, rendering that experience of limited or no

utility in construing the diversity statute. And in any event, the predominant view under the bankruptcy venue statute held that, in the case of a multistate corporation with dispersed operations, the principal place of business was the headquarters.

This case illustrates the flaws in respondents' approach. Respondents' test leads to the implausible conclusion that a corporation headquartered in New Jersey and conducting operations in 44 States, and deriving more than 80% of its revenue outside California, is nonetheless a California citizen because its aggregate business activity in California exceeds its quantum of activity in any other single State. Under that analysis, virtually any national corporation doing business in California at a level roughly proportional to that State's share of the population could be deemed a California corporation—depriving such corporations of access to federal court in that State. Congress did not intend that result, and no circuit other than the Ninth sanctions it.

I. THIS COURT POSSESSES CERTIORARI JURISDICTION UNDER 28 U.S.C. § 1254

Respondents contend as a threshold matter (Br. 1-2) that the general bar on appellate review of district court remand orders in 28 U.S.C. § 1447(d) precludes this Court from exercising certiorari jurisdiction in this case under 28 U.S.C. § 1254. That contention is incorrect. Section 1254 gives this Court jurisdiction to "review[] ... by writ of certiorari" any "case[]" that is "in the court of appeals." Because this "case" plainly was "in the court of appeals," this Court possesses certiorari jurisdiction to review it.

Contrary to respondents' argument, § 1447(d) creates no exception to § 1254's unqualified grant of

authority to this Court to review cases "in" the courts of appeals. As this Court held in *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947), § 1447(d) does not "affect[] [this Court's] authority to review an action of the Circuit Court of Appeals directing a remand to a state court."

Respondents nonetheless argue (Br. 2) that Congress impliedly limited the period in which this Court could exercise certiorari jurisdiction with respect to a remand order under the Class Action Fairness Act (CAFA) when it required the denial of a CAFA appeal in that context if "a final judgment on appeal ... is not issued" within 70 days. 28 U.S.C. § 1453(c). Respondents are mistaken. By its terms, the CAFA provision limits the period in which "the *court of appeals* ... [must] complete all action" in an appeal from an order granting or denying a remand. 28 U.S.C. § 1453(c)(2), (4) (emphasis added). CAFA does not purport to address or limit *this Court's* unqualified authority under § 1254 to review any case "in the court of appeals." And this Court has repeatedly rejected arguments that its jurisdiction has been repealed or limited by implication. *See Felker v. Turpin*, 518 U.S. 651, 660-61 (1996). The Court therefore possesses certiorari jurisdiction under § 1254 to review the court of appeals' decision.

II. A CORPORATION'S PRINCIPAL PLACE OF BUSINESS UNDER THE DIVERSITY STATUTE IS ITS HEADQUARTERS

A. The Statutory Terms And Structure Support A Headquarters Test

1. Respondents contend that the diversity statute requires a court to aggregate all of a corporation's individual places of business throughout a

State to determine which *State* is the corporation's principal place of business. The text of the diversity statute, however, does not ask which *State* is a corporation's principal place of business. Instead, it requires identifying the single "place of business" within a State that constitutes a corporation's "principal" place of business. 28 U.S.C. § 1332(c)(1).

a. Absent some indiction to the contrary, phrases in statutes bear their "ordinary meaning." *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879 (2009). The ordinary meaning of "place of business" is a single business situs, such as "an office, a retail store, or a manufacturing plant," not an entire State. *American Heritage Dictionary of Business Terms* 394 (David L. Scott, ed. 2009). Consistent with the ordinary understanding of the phrase, numerous federal and state statutes use "place of business" to refer to a single business location. Pet. Br. 18-20. Respondents do not dispute that "place of business," in every one of the referenced federal and state statutes, refers to a particular business situs; and respondents conversely identify *no* statute in which the phrase refers to a State as a whole.

The structure of the diversity statute confirms that "place of business" refers to a single business location within a State, not the State as a whole. Had Congress intended to establish an approach calling for an amalgamation of all of a corporation's business activity throughout a State, Congress could have easily done so. Congress, however, did not make a corporation a citizen of "the State *that is* its principal place of business." Nor did Congress deem a corporation a citizen of its "principal *State* of business." Congress instead rendered a corporation a

citizen of "the State where it has its principal place of business," a formulation that distinguishes between "the State" as a whole, on one hand, and the specific site within the State that constitutes the corporation's "principal place of business," on the other.

b. Respondents contend (Br. 18-19) that the term "principal" transforms the meaning of "place of business" from a single business location to the State as a whole. As respondents recognize, however, the term "principal" simply means "the most important, consequential, or influential," or the "highest in rank" or "authority." Resp. Br. 15 (quoting *Comm'r v. Soliman*, 506 U.S. 168, 174 (1993)); *Black's Law Dictionary* 1355 (4th ed. 1951); *Webster's New International Dictionary* 1966 (2d ed. 1955). Thus, the term "principal" requires identifying the most important, consequential, influential, or highest-ranking individual business site; it does not transform the meaning of "place of business" from a single business location within a State to an amalgamation of places of business throughout a State.

This Court's decision in *Commissioner of Internal Revenue v. Soliman*, upon which respondents otherwise rely, makes the point clear. There, the Court held that the phrase "principal place of business" requires a court to assess whether "any one business location is the 'most important, consequential, or influential.'" 506 U.S. at 174; *see id.* at 176 (referring to particular hospitals and a home office as competing locations). The Court manifested the same understanding in *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 317 n.9 (2006), expressly equating the "main office" of a national bank with its "principal place of business" under the diversity statute.

2. a. Once it is accepted that the diversity statute requires identifying a corporation's most important, influential, or highest-ranking single business situs, the statutory inquiry becomes straightforward. A corporation's "principal place of business" is necessarily its headquarters. Because that site directs and controls *all* of the company's operations, it is more "important, consequential, and influential," and is "higher in rank or authority," than any other individual business location.

Reflecting that understanding, dictionaries consistently define a corporation's principal place of business as its headquarters site or its head office. *E.g.*, *Black's Law Dictionary* 1187 (8th ed. 2004); *American Heritage Dictionary of Business Terms*, *supra*, at 408. To the same effect, a multitude of federal and state laws equate a corporation's principal place of business with its headquarters. Pet. Br. 23-25.[1]

b. Respondents raise various arguments, none of which have merit, against the conclusion that the ordinary meaning of the phrase "principal place of

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[1] Respondents observe (Br. 19 n.6) that the *second* definition of "principal place of business" in the *American Heritage Dictionary of Business Terms*, *supra*, at 408 is "the location where the majority of activities relative to a business take place." But Congress expressly rejected a variant of that "majority-of-business-activities" approach when it enacted the "principal place of business" test, choosing the latter over a proposal that would have deemed a corporation a citizen of a State in which it derives a majority of its income. *See* Pet. Br. 41. The secondary definition noted by respondents thus cannot constitute the meaning of "principal place of business" in the diversity statute. In any event, Hertz conducts far less than a majority—at most roughly 20%, *see* Pet. Br. 8—of its business in California.

business" favors a headquarters test. Respondents contend (Br. 15) that the term "principal" requires a comparison between business locations, and that equating the headquarters with the principal place of business fails to allow for such a comparison. That contention is incorrect. A corporation's headquarters constitutes its principal place of business precisely because, "[w]hen *compared with* any other single business location, the headquarters is the most 'important, consequential, and influential' ... and its 'highest in rank' and 'authority.'" Pet. Br. 21 (emphasis added).

Respondents similarly err in arguing (Br. 17) that, if Congress had wished to establish a headquarters test, it would have used the term "headquarters" or "principal executive office," as it did in certain other statutes. As dictionary definitions and numerous federal and state laws confirm, the terms "principal place of business," "headquarters," and "principal executive office" generally carry the same meaning. When the ordinary meaning of a term equals that of an alternative term, Congress's election to use the former rather than the latter affords no basis for departing from the former's ordinary meaning. *See Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) (invoking principle applicable to aiding-and-abetting statutes even though statute at issue uses term "facilitate" rather than "aid and abet," on ground that "facilitate" carries the same meaning as "aid and abet" according to *Black's Law Dictionary*); *Schmidt*, 546 U.S. at 313-14 (concluding that the words "located" and "established" carry the same meaning in 28 U.S.C. § 1348); *Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 784 (2000) (interpreting "person" to include corporation per ordi-

nary meaning, even though Congress defined person in related provision to include a corporation but failed to do so in the provision at issue); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187-90 (1995) (construing phrase "as a step in marketing" to be synonymous with "for the purpose of selling," even though Congress used word "sell" elsewhere in the same subsection). That principle applies even when the alternative formulations appear in the same statute. *See Schmidt*, 546 U.S. at 313-14; *Asgrow Seed Co.*, 513 U.S. at 187-90. It should apply with even greater force when, as here, the different terms appear in different statutes, addressing different subjects, drafted at different times.

Contrary to respondents' argument (Br. 17-18), this Court's decision in *Soliman* poses no obstacle to applying a headquarters test for corporate citizenship. In that case, the Court was required to decide the principal place of business of an individual doctor for tax purposes, rather than the principal place of business of a corporation. The Court held that the doctor's home office failed to constitute his principal place of business when he engaged in preparatory tasks and bookkeeping at his home but serviced his clients primarily at hospitals. 506 U.S. at 178. The Court did not purport to address whether a home office would constitute a taxpayer's principal place of business when he manages and directs his various business operations from that location. Moreover, Congress subsequently amended the statute to clarify that a taxpayer's home is his principal place of business when he conducts his managerial activities there. 26 U.S.C. § 280A(c)(1)(A).

Finally, in an effort to show that a corporation's headquarters is not invariably its principal place of

business, respondents posit (Br. 20) a hypothetical situation in which the Venetian Resort's headquarters would be located in Arizona while its sole casino site would remain in Las Vegas, Nevada. Even in that situation, however, the headquarters location would remain the company's most important, consequential, influential, and highest-ranking site because the headquarters would direct and determine the scope of the activities at the casino. On any given day, the headquarters could direct any change it desired in the operations at the casino in Las Vegas. Accordingly, the headquarters would constitute the corporation's "principal place of business" under the ordinary meaning of the term.

3. Even if a corporation's headquarters were not invariably a corporation's principal place of business, that would not affect the result in this case. At the very least, a corporation's headquarters constitutes its "principal place of business" in the case of a multistate corporation with dispersed operations.

This case is illustrative. Hertz operates numerous rental locations spread across 44 States. All of those business operations are directed and controlled from the company's corporate headquarters in Park Ridge, New Jersey. In those circumstances, the headquarters plainly constitutes the company's most important, consequential, influential, and highest-ranking location.

In particular, that site exceeds in importance, influence, and rank, any of the 273 individual rental locations in California. Respondents do not suggest otherwise. But the headquarters is also more important, consequential, influential, and higher in rank than the combination of the rental locations in Cali-

fornia, which together account for less than 20% of Hertz's business activity. The company's combined activities in California could not be considered to exceed its headquarters in importance, consequence, influence, and rank, when the headquarters bears responsibility for directing and controlling *all* of the corporation's operations in *all* 44 States in which it conducts business.

Indeed, while respondents generally attempt to equate the Ninth Circuit's test with that of other circuits (Br. 4-5), the Ninth Circuit stands alone in ignoring the significance of a corporation's headquarters in the circumstances of a multistate corporation with dispersed operations. The Seventh Circuit applies a headquarters test in all situations. *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991). Every other court of appeals to consider the issue generally concludes that the "nerve center" or "headquarters" constitutes the principal place of business in the case of a corporation with operations that are "far flung" or "dispersed over several states."[2] The ordinary meaning

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[2] *See, e.g., Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005) ("[T]he nerve center test governs in the context of a corporation with 'complex and farflung activities.'"); *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979) ("[T]he principal place of a business of a far-flung corporate enterprise is 'the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities.'"); *Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 852-54 (3d Cir. 1960) (principal place of business was where "the Operation Policy Committee" was located); *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004) ("Generally, when considering a corporation whose operations are far flung, the sole nerve center of that corporation is more significant." (internal quotation marks omitted)); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993) ("Where the

541 U.S. 567, 582 (2004); *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145, 152 (1965).

a. In arguing that the complexity of their approach should not counsel against its adoption, respondents identify (Br. 44-52) certain other jurisdictional inquiries that they regard as substantially complex. But none of the inquiries identified by respondents compares to respondents' multi-factor and highly amorphous balancing test. *See* pp. 19-23, *infra*. More fundamentally, respondents' argument misperceives the nature of the strong preference in favor of clear and easily administered jurisdictional rules. That preference would not control when the terms of a jurisdictional statute unambiguously dictate a particular, fact-based jurisdictional test. Instead, the preference for clear jurisdictional rules assumes significance when it reinforces the ordinary meaning of a statute or when the statutory terms bear more than one construction. *See Navarro*, 446 U.S. at 460-61, 464 n.13; *Grupo Dataflux*, 541 U.S. at 582; *United Steelworkers*, 382 U.S. at 152.

Here, the ordinary meaning of the diversity statute strongly favors a headquarters test. But even assuming that the terms of the statute were ambiguous on the matter, the substantial preference for clear and easily administered jurisdictional rules would resolve any ambiguity in favor of a headquarters test.

That preference has particular salience here in light of the circumstances surrounding Congress's enactment of the "principal place of business" formulation. Congress selected that formulation over an alternative approach that would have deemed a corporation a citizen of a State in which it received

more than half of its gross income. Pet. Br. 41. Congress was advised that the latter approach would be unduly complex to administer. Respondents' contrary view (Br. 24) is erroneous. While the Judicial Conference initially described the gross-income test as easy to administer, *see* S. Rep. No. 1830, 85th Cong. (1958), *reprinted in* 2 U.S.C.C.A.N. 3099, 3120, it revised that view after conferring with the circuit conferences, ultimately concluding that the gross-income test "would be difficult to apply" and instead recommending enactment of the principal place of business test because it afforded a "simpler and more practical formula." *Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong. 36 (1957); S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3132 (Judicial Conference Committee letter); *accord id.* at 3107 (Administrative Office of the Courts letter). Adopting respondents' approach—which entails far more complexity and uncertainty than even the gross-income test rejected by Congress—would conflict with Congress's evident desire for a "simpler and more practical formula."

b. The various jurisdictional inquiries highlighted by respondents do not counsel in favor of adopting respondents' amorphous and uncertain test for corporate citizenship. Respondents initially argue that the prevailing test for determining an individual's citizenship "is at least as fact-intensive" as their proposed multi-factor, multi-stage test for corporate citizenship. Br. 45-46. That is incorrect. For individual citizenship, a court need only determine whether a person resides in a State and intends to remain there indefinitely. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). That

test is "familiar, well-settled, and easy to apply." *Gaudin v. Remis*, 379 F.3d 631, 637 (9th Cir. 2004).

Respondents likewise err in relying on (Br. 46-48) the constitutional tests for personal jurisdiction and standing. Even assuming that the jurisdictional inquiries prescribed by the Constitution shed light on the choice among competing interpretations of a jurisdictional statute, the constitutional inquiries emphasized by respondents do not approach the level of complexity and uncertainty surrounding their test for corporate citizenship. For personal jurisdiction, a court need only decide whether the defendant has "minimum contacts" with the relevant State. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 307-09 (1992). And for standing, a court must find that the plaintiff has experienced an injury in fact, caused by the defendant's conduct, and likely to be redressed by a favorable decision. *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). While neither inquiry involves a bright-line test and each can present difficult issues on occasion, the inquiries are relatively straightforward in the mine run of cases.

By comparison, respondents' test requires examining—in every case—multiple factors including, but not limited to, the location of employees, tangible property, production activities, sources of income, and sales. Resp. Br. 4. A court must then decide, without any definition of the key terms and without any guidance on how to balance the various factors, whether a "substantial predominance" of those activities takes place in one State. Then, if no one State contains a substantial predominance of business activities, the corporation's principal place of business is its headquarters. That approach is sub-

stantially more indefinite and open-ended than the tests for personal jurisdiction and standing.

Finally, respondents contend (Br. 49-52) that CAFA establishes a "remarkably complex" jurisdictional inquiry and therefore supports a complicated test for corporate citizenship. But the threshold jurisdictional inquiry under CAFA (assuming a headquarters test for corporate citizenship) is straightforward. Contrary to respondents' suggestion (Br. 49), CAFA does not require determining the citizenship of all putative class members and every defendant. Because CAFA confers federal jurisdiction based on minimal diversity—*i.e.*, whenever "any member of a class of plaintiffs is a citizen of a State different from any defendant," 28 U.S.C. § 1332(d)(2)(A)—a court need only establish diversity between one plaintiff and one defendant.

To be sure, the CAFA exceptions cited by respondents can invite more detailed factual inquiries. But because those exceptions were intended to be narrow (Pet. Br. 52-53) and only arise if invoked by a party, they do not raise the same concerns about wasteful litigation presented here. While every CAFA case involving a corporate party requires determining the corporation's citizenship, questions surrounding the exceptions arise far less frequently. Indeed, in cases with one defendant, once CAFA jurisdiction is determined to exist, the exceptions necessarily become inapplicable. *See* 28 U.S.C. § 1332(d)(4); *id.* § 1332(d)(3).

C. The Headquarters Test Conforms To The Traditional Rules For Determining Individual Citizenship

The statutory context favors a headquarters test in another respect as well: the statute involves the determination of citizenship for purposes of diversity jurisdiction, and the traditional rules for determining an individual's citizenship support a headquarters test for corporate citizenship. An individual's citizenship depends on a person's conscious choice to reside in a State and to remain there indefinitely. *See Miss. Band of Choctaw Indians*, 490 U.S. at 48. Those factors of a conscious and durable choice of residence favor a headquarters test for corporate citizenship. A corporation makes a conscious choice about where to locate its headquarters, and that choice reflects an intention to make that site its permanent home.

Respondents, relying on a study of the movement of corporate headquarters, question the durability of a corporation's selection of its headquarters. Br. 39-41. But that study greatly overstates the movement of corporate headquarters for purposes of diversity jurisdiction because, as respondents acknowledge (Br. 39 n.11), "[t]he definition of 'headquarters' used by th[e] study is significantly broader than that contemplated by the parties to this case and the case law interpreting 'principal place of business.'" The study's definition of a "move" also overstates the relevant movement because it includes headquarters relocations *within* a State, which would have no bearing on State citizenship. *See* Vanessa Strauss-Khan & Xavier Vives, *Why and Where Do Headquarters Move?*, 39 Regional Sci. & Urb. Econ. 168, 182, tbl. A7 (2009) (listing moves from Harrisburg to

Pittsburgh and Pittsburgh to Philadelphia); Resp. Br. 39 n.11.

In any event, the existence of some degree of movement in no way undermines the analogy to an individual's citizenship. A significant number of individuals may shift their State of citizenship. The critical point is that they make a conscious choice to do so, and they have a fixed intention to remain at their new home. Nothing in the study cited by respondents suggests that is not also true of corporations that may shift their headquarters.

Indeed, the study cited by respondents demonstrates the care with which a corporation selects its headquarters site. The study concludes that corporations opting to move their headquarters do so for critical, business-related reasons, such as "good airport facilities," "high levels of business services," and "agglomeration of headquarters in the same sector of activity." Strauss-Khan, *supra*, at 169. And the study also notes the "moving and set up" costs associated with a change. *Id.* at 176. Those considerations reinforce that, as with an individual's selection of his State of citizenship, a corporation's selection of its headquarters site is a matter of considered choice. Nothing in the study suggests that corporations change their headquarters for jurisdictional purposes.

In contrast, respondents' approach to corporate citizenship bears no resemblance to the traditional manner of determining citizenship. Under their approach, a corporation's citizenship could vary from year to year based on factors having nothing to do with corporate choice, such as a change in a State's regulations, an adjustment of a State's tax rates, or a

shift in a State's economic health. In short, while the headquarters test coheres with the basic conception of citizenship, respondents' approach does not.

D. The Headquarters Test Is Consistent With The Background And Purposes Of § 1332

Respondents contend that their approach accords with the background and purposes of the diversity statute, and that the headquarters test does not. In fact, the opposite is true.

1. According to respondents (Br. 34-35), the legislative history shows an intent by Congress that "principal place of business" in the diversity statute carry the same meaning the phrase had acquired in judicial decisions interpreting a bankruptcy venue statute. As respondents recognize (Br. 35), however, courts had adopted varying approaches in construing the bankruptcy venue statute. As explained by one of the cases on which respondents rely, there existed a "substantial conflict" on whether "the principal place of business is located at the general executive offices where the business affairs of the corporation are managed, or in the district of the factories, mills, or mines, of the corporation." *Inland Rubber Corp. v. Triple A Tire Serv. Inc.*, 220 F. Supp. 490, 495 (S.D.N.Y. 1963). In light of the "substantial conflict," the experience of courts construing the bankruptcy statute is of limited, if any, value in interpreting the diversity statute. That is particularly true because where, as here, the statutory text and context favor the headquarters test, "murky, ambiguous, and contradictory" legislative history can afford no justification for adopting a contrary interpretation. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

In any event, while courts may have been in substantial conflict on whether the bankruptcy venue statute supported an across-the-board headquarters test, courts generally agreed that the headquarters constituted the principal place of business for a multistate corporation like Hertz with dispersed operations. As Judge Maris informed Congress, "[w]here a corporation's interests are rather widespread," bankruptcy courts had "generally taken the view" that the "principal place of business" was the corporation's headquarters, *i.e.*, the "place where its business operations are coordinated, directed, and carried out, which would ordinarily be the place where its officers carry on its day-to-day business, where its accounts are kept, where its payments are made." House Judiciary Hearings at 37. The cases bear out Judge Maris's testimony.[3]

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[3] *Burdick v. Dillon*, 144 F. 737, 738 (1st Cir. 1906) ("[W]hen a corporation operating factories, mills, or mines in various states, has a principal office where business is transacted of the character of that conducted at [the principal office of the bankrupt company], such principal office, rather than a factory, mill, or mine, according to ordinary understanding and speech, as well as according to the intent of Congress, constitutes the 'principal place of business,' within the meaning of the bankruptcy act."); *In re Hudson River Nav. Corp.*, 59 F.2d 971, 974 (2d Cir. 1932) (explaining that "[n]o satisfactory solution can be reached by trying to balance one [place of business] against another" and holding principal place of business to be in district housing offices from which corporation's officers exercised "supreme direction and control" of "all of [corporation's] business"); *In re Pusey & Jones Co.*, 286 F. 88, 94 (2d Cir. 1922) (quoting Special Master report "accept[ing] it as the rule that, where a corporation has plants in two different states and an office in a third state, from which its operations are directly managed and controlled, such office will constitute the principal place of business of the corporation within the meaning of the bankruptcy statute"); *Dryden v. Ranger Refining & Pipe Line Co.*,

Indeed, the bankruptcy case most featured by respondents (Br. 27) in arguing against a headquarters test, *In re Monarch Oil Corp.*, 272 F. 524, 526 (S.D. Ohio 1920), failed to involve a multistate corporation with dispersed operations. *See id.* at 524. That case also relied on reasons unique to the bankruptcy context: the interest in adjudicating a corporation's bankruptcy where the corporation's assets and creditors are located. *Id.* at 526. Congress should not be assumed to have intended to import cases that turn on bankruptcy-specific venue concerns into a diversity statute serving entirely distinct purposes. *See Schmidt*, 546 U.S. at 316 ("[V]enue and subject-matter jurisdiction are not concepts of the same order.")

Respondents' reliance on cases construing the bankruptcy venue statute is particularly unwarranted because none of the cases they cite supports their proposed "substantial predominance" test. No bankruptcy case cited by respondents suggests that a corporation headquartered in a different State could be a citizen of a State in which it conducts only 20% of its business simply because its business activ-

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280 F. 257, 262-63 (5th Cir. 1922) ("Where a corporation conducts its business at a number of places, no one of which is plainly the place where its business is principally conducted, one of such places, where a substantial business is transacted, and from which general supervision of all of its business is exercised, may be properly held to be the principal place of business of such corporation"); *Cont'l Coal Corp. v. Roszelle Bros.*, 242 F. 243, 246 (6th Cir. 1917) ("Where a corporation has more than one mine, quarry, or manufacturing plant, situated in different districts, its office from which supreme direction and control of the business generally is had, including the operations of the several plants, may, and perhaps must, be deemed the principal place of business.").

ity in that State substantially exceeds that in any other single State. Judicial experience with the bankruptcy venue statute thus ultimately undermines respondents' argument.

2. Respondents assert (Br. 38) that a headquarters test would fail to address the evil Congress sought to eliminate when enacting the "principal place of business" provision. That contention is incorrect.

The sole evil that Congress sought to correct was the "fiction" by which "a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State." S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3101-02. Treating a corporation's principal place of business as its headquarters does not perpetuate that "fiction." What made a local institution obtaining access to federal court through an out-of-state charter a "fiction" was that the local corporation did not "intend[] to do business in the [chartering] State." House Judiciary Hearings at 39. A corporation's decision to locate its *headquarters* in a State, by contrast, necessarily involves a decision to "do[] business" there. Indeed, it involves a decision to do the corporation's most important, consequential, and influential business in that State. There is therefore nothing at all "fictional" about enabling a corporation to become a citizen of the State in which it elects to locate its headquarters site.

At any rate, the concern identified by Congress applied solely to the ability of a "local institution, engaged in a local business" to obtain access to a federal court. S. Rep. No. 1830, 2 U.S.C.C.A.N. at 3102.

That concern did not extend to corporations like Hertz, "which do business over a large number of States." *Id.* Accordingly, even assuming, *arguendo*, that it would constitute a fiction to treat a "local institution, engaged in a local business" in one State as a citizen of a different State in which it maintains its headquarters, there could be no conceivable claim that it would constitute a fiction to treat a multistate corporation with dispersed operations (like Hertz) as a citizen of the State where it maintains its national headquarters.

3. Finally, respondents largely ignore Congress's aim to preserve a corporation's ability to obtain a federal forum in every State except the State of incorporation and the State where the corporation has its principal place of business. Congress rejected proposals that would have denied corporations access to diversity jurisdiction altogether or would have deemed a corporation a citizen of any State in which it engaged in business. Pet. Br. 44-45. Congress's rejection of proposals to more broadly restrict corporations' access to federal court reflected its understanding that corporations still faced potential bias "in States remote from their headquarters." House Judiciary Hearings at 35-36.

In particular, Congress disagreed with respondents' assertion (Br. 31) that a corporation confronts no risk of bias in any State in which it has a substantial presence. Had Congress shared that belief, it would have denied corporations access to federal court in any State in which the corporation had such a presence. Congress instead preserved a corporation's access to federal court in at least 48 out of 50 States, necessarily reflecting a view that substantial presence alone fails to eliminate the risk of bias.

Congress's judgment is entirely understandable. Corporations are normally identified with the State in which they maintain their headquarters, not the States in which they have a substantial presence. Even when a corporation does substantial business in a State, persons in that State are likely to regard the corporation as an out-of-State corporation if its headquarters is located elsewhere—*i.e.*, the identification of Coke with Georgia, Microsoft with Washington, and Wal-Mart with Arkansas, notwithstanding that those companies conduct substantial business in numerous States. Respondents identify no counterexample of a corporation identified with a State in which it conducts 20% of its business, even though it maintains its headquarters in a different State.

That is precisely why an attorney would attempt to elicit jury bias against a corporation doing substantial business in a State by pointing out that the decisions causing the plaintiffs' injuries emanated from the company's out-of-state headquarters. *See Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 276 (5th Cir. 1998) (attorney arguing to jury that decisions were made at Kmart's corporate headquarters "way up there in Troy, Michigan"). Conversely, it would be highly surprising if an attorney trying a case in a corporation's headquarters State attempted to tarnish the company as an out-of State corporation on the basis that it does 20% of its business in a different State. The headquarters test thus best promotes Congress's goal of ensuring that a corporation has access to federal court where there remains a danger that it will be regarded as an out-of-State corporation.

E. HERTZ IS A CITIZEN OF NEW JERSEY, NOT CALIFORNIA

For the reasons discussed, the text, context, and background of the diversity statute uniformly point to a corporation's headquarters as its principal place of business. At the very least, those factors establish that, for multistate corporations with dispersed operations, the headquarters is the principal place of business. In either event, because Hertz is a multistate corporation with dispersed operations, the company's principal place of business is its headquarters. Hertz therefore is a citizen of New Jersey, not California.

Even if other tests for determining a corporation's principal place of business could be imagined, respondents' substantial predominance test cannot be squared with the language, context, or background of the diversity statute. The Ninth Circuit's application of that test to Hertz demonstrates the extent to which it departs from a plausible interpretation of the statute. The Ninth Circuit deemed Hertz a citizen of California, even though it derives no more than 20% of its overall business there, simply because that amount was considered to exceed substantially the amount of business it conducted in any other single State. Under that approach, virtually any national corporation doing business in California at levels roughly proportional to California's share of the population could be deemed a California corporation. No plausible understanding of the phrase "principal place of business" could justify that outcome. The Ninth Circuit itself appears to have recognized as much, suggesting that its test could be modified to account for the size of a State's population. *Davis v. HSBC Bank Nev. N.A.*, 557 F.3d 1026,

1028-30 & n.4 (2009). Under that per capita approach, California would not be Hertz's principal place of business.

Under other tests, Hertz's principal place of business would be its headquarters. That would include a test looking to the headquarters unless all, substantially all, or even a majority of the company's operations were in a different State (the last of which respondents appear to endorse at certain points, *see* Br. 10, 14). In short, under the correct approach, as well as any other approach except that of the Ninth Circuit, Hertz's principal place of business is its headquarters at 225 Brae Boulevard, Park Ridge, New Jersey.

CONCLUSION

The judgment of the court of appeals should be reversed.

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SUPPLEMENTAL BRIEF

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Supreme Court of the United States

THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, *et al.*,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The Hertz Corporation is a wholly owned subsidiary of Hertz Global Holdings, Inc., a publicly traded corporation on the New York Stock Exchange. No publicly traded corporation owns 10% or more of Hertz Global Holdings, Inc.'s common stock.

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INTRODUCTION

In support of its pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner The Hertz Corporation ("Hertz") submits this supplemental brief regarding the intervening decision in *Davis v. HSBC Bank Nevada, N.A.*, ___ F.3d ___, No. 08-57062 (9th Cir. Feb. 26, 2009).[1] In *Davis*, the Ninth Circuit addressed the exact same issue that led to the filing of Hertz' Petition, i.e., the appropriate test for determining a corporation's principal place of business pursuant to 28 U.S.C. § 1332(c)(1). As explained below, the opinion in *Davis* only solidifies the circuit court split on this issue described in Hertz' Petition, and heightens the need for this Court to provide uniformity in how federal district courts determine the existence of their diversity jurisdiction.

With respect to the circuit split, *Davis* reiterates the Ninth Circuit's reliance on the place of operations test for determining a corporation's

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[1] The decision in *Davis* was issued on February 26, 2009 and Hertz first learned of it on February 27, 2009, the same day its Petition for Writ of Certiorari (the "Petition") in this matter was printed. Rather than seeking an extension of time to rewrite the Petition to address *Davis*, Hertz filed the Petition as scheduled and then prepared this Supplemental Brief in accordance with Supreme Court Rule 15.8. As *Davis* is not yet published, for purposes of convenience, Hertz has reproduced *Davis* in a Supplemental Appendix (included herein and referred to as "Supp. App.") and will cite to that case using the appropriate page of the Supplemental Appendix.

principal place of business, and it extends the application of that test to all corporations, regardless of their size or the scope of their business operations. As described in Hertz' Petition, this test conflicts with those used by every other circuit and these differing tests produce results not permitted by 28 U.S.C. § 1332(c)(1), i.e., corporations being deemed to have more than one principal place of business.

With respect to the heightened need for uniformity, and as recognized by Judge Kleinfeld's concurring opinion in *Davis*, the "mathematical gyrations" required by the place of operations test will continue to generate "excessive unpredictability" in determining a corporation's principal place of business and yield results which are more a product of "fortuity" than reasoned principles of law. Jurisdictional determinations should not be left to guesswork. *Davis* heightens the need for this Court to provide definite and well-defined principles pursuant to which federal courts can determine the existence of their diversity jurisdiction.

ARGUMENT

I. *Davis* Extends the Place of Operations Test to All Corporations and Solidifies the Circuit Split Identified in Hertz' Petition

In *Davis*, the Ninth Circuit unequivocally reaffirmed its reliance on the place of operations test as the primary test for determining a corporation's principal place of business pursuant to 28 U.S.C. § 1332(c)(1). *Davis*, Supp. App. at 4a ("In this circuit

we apply two tests . . . [f]irst we apply the place of operations test . . . [and only i]f no state contains a substantial predominance of corporate operations [do] we apply the nerve center test"). In addition, and notwithstanding its acknowledgment that corporations with business activities spread across many states are "much less likely" to have operations that substantially predominate in one state, *Davis* extended the application of this test to all corporations, regardless of the size or scope of their business operations. *Id.* at 8a (a nationwide corporation will be deemed to be a California citizen when a substantial predominance of its business operations are in California). As recognized by the concurring opinion in *Davis*, "rather than limiting application of what is plainly the wrong test for national corporations (the place of operations test), the majority opinion extends [that test]" to all corporations. *Id.* at 12a.

As a result of this extension, whenever the Ninth Circuit determines a corporation's principal place of business, it will continue to ignore the location from which the corporation directs and controls its business activities unless the corporation first proves that its business activities and assets are so evenly spread out that no one state substantially predominates over any other single state. As explained in Hertz' Petition, this test conflicts with the tests used by every other circuit (i.e., under the nerve center test, the distribution of business activities and assets are irrelevant to determining a corporation's principal place of business; under the center of corporate activities test, such facts are

relevant to the determination, but they are of lesser importance; and, under the totality of the circumstances test, they are included in an evaluation of all the locations where the corporation does business) and these conflicts will continue to result in corporations being deemed to have more than one principal place of business for purposes of diversity jurisdiction. As explained in Hertz' Petition, however, a corporation can have only one principal place of business for purposes of diversity jurisdiction.

The majority opinion in *Davis* implicitly recognizes a flaw in the place of operations test and laments the inability to adopt the nerve center test used by Judge Kleinfeld. *Davis*, Supp. App. at 4a, n. 3 ("Were we writing on a clean slate, we would find much in favor of the rule suggested by the concurrence. But we see ourselves as bound by the holding in *Tosco*."). This Court, however, is not so bound and it has a clean slate upon which to resolve this conflict and establish a uniform and administrable standard for determining a corporation's principal place of business.

II. The Methodology for Applying the Place of Operations Test Generates Excessive Unpredictability, Encourages Expensive Litigation and Leads to Results Predicated on Fortuity

According to *Davis*, the place of operations test is to be applied as follows: (1) if any single state contains a substantial predominance of a

corporation's business activities, then the corporation's principal place of business is located in that state; (2) in determining whether such a substantial predominance exists, the court is required to compare the corporation's business activities in the state at issue to its business activities in other individual states; (3) if business activities in the state at issue are substantially larger than the activities in any other individual state, a substantial predominance exists; (4) a finding of substantial predominance does not require that a majority of the corporation's business activities occur in the state at issue; and, (5) no hard and fast rules or percentages exist for determining when the difference in business activities between two states is substantial. *Davis*, Supp. App. at 4a – 7a. Hertz respectfully submits that this is the equivalent of saying "we know it when we see it, but do not ask us to explain why we see it the way we do."

Such concerns are echoed by the concurring opinion in *Davis*, which recognizes that such state-to-state comparisons "only assures identification of the state that has 'substantially' more than the state it is compared to," and it says nothing about whether that location is the principal, most important or most influential place of business in comparison to all others. *Id.* at 12a. As the concurring opinion in *Davis* goes on to recognize, "identification by this comparison . . . will have little to do with the correctness of the methodology . . . more to do with fortuity . . . [and it will] generate[] excessive unpredictability and encourage[] expensive litigation

to identify the 'principal place of business' for corporations that operate in multiple states." *Id.*

Any doubt about the validity of these concerns should be resolved by comparing *Davis* to the instant case. Both involve corporations with business operations spread across many states, i.e., Best Buy (49 states) and Hertz (44 states), each of which have more than 80% of their business activities located outside of California, i.e., Best Buy (87%-89% outside of California) and Hertz (80%-83% outside of California). Yet, the Ninth Circuit found that Hertz had a substantial predominance of its business in California, while finding that Best Buy did not. *Davis*, Supp. App. at 7a.[2/]

[2/] Does Hertz' car rental business substantially predominate in California because 17%-20% of its employees, facilities and revenues are located there, whereas Best Buy's retail consumer electronics business does not substantially predominate in California because it only has 11%-13% of its employees, facilities and revenues there? Do the differing natures of their businesses, and the 6% to 7% differential in their business activities in California, mean that Hertz is more familiar to the citizens of that state despite the fact that Best Buy has nearly 13,000 more employees than Hertz in California, i.e., 16,033 versus 2,299, and generates over $3.3 billion dollars more in revenues there than Hertz, i.e., $4.2 billion versus $818 million? *Compare Davis*, Supp. App. at 36a – 37a and Pet. App. 26a at ¶¶ 7-8. If so, what rationale and mathematical gyrations warrant such conclusions and where is the line to be drawn between substantial predominance and mere predominance? Moreover, what does any of this have to do with the ordinary meaning of the term "principal place of business" or the underlying purposes of diversity jurisdiction?

In *Davis*, the court gave no indication that its opinion conflicted with the unpublished opinion in the instant case.[3/] Nonetheless, these decisions are irreconcilably conflicted and the conflicts are, in large part, a function of the flawed methodology utilized by the Ninth Circuit in applying the place of operations test. Absent review, diversity jurisdiction in the Ninth Circuit will continue to be a function of fortuity, with litigants left to guess in which court they belong.

III. Absent the Court Granting Plenary Review, it Should Grant this Petition, Vacate the Decision Below, and Remand the Matter to the Ninth Circuit for Reconsideration in Light of *Davis*

Pursuant to 28 U.S.C. § 2106, this Court has the power to grant, vacate and remand ("GVR") cases when a supervening event "alters the basis upon which the judgment rests . . . ." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161, 65 S. Ct. 573 577 (1945) (Douglas, J. dissenting); *see also*, *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 607 (1996)(*per curiam*)(GVR appropriate where there are intervening developments which reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity and such a redetermination may determine the ultimate outcome of the

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[3/] Since Circuit Judge Ikuta was a member of the panels in both cases, the *Davis* panel was aware of the order affirming the remand in the instant case to state court.

litigation).[4] Where, however, "it appears that the intervening development . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence*, 516 U.S. at 167 – 168, 116 S. Ct. at 607.

While Hertz respectfully submits that certiorari should be granted to resolve the above-described circuit split, and provide needed uniformity, this case meets all of the factors required for the issuance of a GVR and the equities would favor such relief. First, the recently issued decision in *Davis*, which is published and, therefore, binding precedent in the Ninth Circuit, clearly qualifies as an intervening development. *See, e.g., Metropolitan Life Ins. Co. v. Hawkins-Dean*, 549 U.S. 1048, 127 S. Ct. 659 (2006)(memorandum)(GVR for reconsideration in light of intervening *en banc* decision by Ninth Circuit); *Kyle v. United States*, 504 U.S. 980, 112 S. Ct. 2959, 2959 – 2960 (1992)(memorandum)(GVR for reconsideration in light of intervening Fifth Circuit panel decision). Second, there is a reasonable probability that the

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[4] A GVR in this case would not implicate the concerns expressed by the dissent in *Lawrence* and *Stutson v. United States*, 516 U.S. 163, 191-192, 116 S. Ct. 604, 619 (1996)(Scalia, J. dissenting) since it does not involve a situation where a party to the litigation is repudiating or changing its position on a particular point of law. Rather, the Ninth Circuit's published decision in *Davis* is "an intervening factor [which] has arisen which has a legal bearing upon the decision." *Id.*

unpublished opinion in the instant case rests on premises which the Ninth Circuit now rejects in a published, binding decision, i.e., *Davis* specifically considered the nationwide nature of Best Buy's retail consumer electronics business activities, and the distorting effect of California's population on those business activities, in finding that Best Buy's business activities did not substantially predominate in California whereas the panel herein saw no policy reasons for doing so.[5/] Third, a remand may determine the ultimate outcome of this litigation because, after application of the holding in *Davis*, the Ninth Circuit could reasonably conclude that the case should proceed in federal court and the state court proceeding to which Hertz objects would come to an end. Finally, the equities support a GVR since the intervening development of the law as announced in *Davis* is not "part of an unfair or manipulative litigation strategy" by Hertz.

For all of these reasons, if the Court does not grant Hertz' Petition for the purpose of deciding the case on the merits, it should grant the Petition, vacate and remand the Ninth Circuit's decision.

[5/] Since *Davis* affirmatively recognized a legal standard for determining principal place of business which was previously rejected by the Ninth Circuit in the instant case, a GVR is appropriate. *See, e.g., Metropolitan Life Ins. Co. v. Hawkins-Dean*, 549 U.S. 1048 (2006)(memorandum)(GVR for reconsideration in light of Ninth Circuit decision modifying that circuit's legal standard for judicial review of benefits decisions by plan administrators).

CONCLUSION

While a GVR in this matter would be appropriate, it would not resolve the circuit split described in Hertz' Petition and recognized by the concurring opinion in *Davis*, Supp. App. at 38a ("[c]omparison of individual states . . . likely to lead to intercircuit conflicts about where national business[es] are citizens"). The Ninth Circuit will continue to apply the place of operations test, the Seventh Circuit will continue to apply the nerve center test, the Third Circuit will continue to apply the center of corporate activities test, the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits will continue to apply the totality of the circumstances test and, depending on the circumstances, the First, Second and Fourth Circuits will continue to apply either the place of operations test or the nerve center test. Since the differing emphases of these tests yield different results when applied to the same facts, courts will continue to find that corporations have more than one principal place of business for purposes of diversity jurisdiction. In addition, the Ninth Circuit will continue to determine a corporation's principal place of business pursuant to a test which (1) does not compare all the places where it conducts business and (2) seeks to draw a line between substantial predominance and mere predominance without any guideposts for making that determination.

A matter as fundamental as a court's jurisdiction to hear a dispute should not be left to such conflicts and confusion. Corporations should

not be left to guess about the location of their principal place of business. As requested in Hertz' Petition, this Court should establish definite and well-defined principles for determining the existence of diversity jurisdiction and *Davis* only heightens the need for the Court to do so.

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF *DAVIS V. HSBC BANK NEVADA, N.A.* FILED FEBRUARY 26, 2009 – FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 08-57062

D.C. NO. 2:08-CV-05692-GHK-JC

GARY DAVIS, ET AL.

Plaintiffs-Appellees,

v.

HSBC BANK NEVADA, N.A., ET AL.

Defendants-Appellants.

OPINION

Appeal from the United States District Court for the Central District of California

George H. King, District Judge, Presiding

Argued and Submitted February 9, 2009

Pasadena, California

Filed February 26, 2009

Supplemental Appendix

Before: KLEINFELD, BEA, and IKUTA Circuit Judges.

Opinion by Judge Bea

BEA, Circuit Judge:

Defendants appeal the district court's order granting plaintiff Gary Davis's motion to remand Davis's putative class action to state court.[1] The only issue on appeal is whether Best Buy, a nationwide electronics retailer, has its principal place of business in the state of California. We reverse.

Plaintiff Gary Davis, as a private attorney general on behalf of himself and a putative class of similarly situated California consumers, sued HSBC Bank Nevada, N.A., HSBC Finance Corporation, Best Buy Company, and Best Buy Stores, L.P. in California Superior Court and alleged claims for unfair competition under Cal. Bus. & Prof. Code § 17200, false advertising under § 17500, and common law fraud in the nature of concealment. Davis's complaint alleges the defendants defrauded California customers by offering credit cards without adequately disclosing the annual fee the customers would be charged for use of the card.

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[1] We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1453(c)(1).

Supplemental Appendix

The defendants removed the action to federal district court and based on the Class Action Fairness Act of 2005 ("CAFA"). Davis filed a motion to remand the action to state court and contended that the local controversy exception, 28 U.S.C. § 1332 (d)(4),[2] barred the exercise of federal jurisdiction. The district court granted the motion to remand, and the defendants timely appealed.

The only issue on appeal is whether Best Buy Stores has its principal place of business in California. If not, Best Buy Stores is not a citizen of California, the local controversy exception does not apply, and federal jurisdiction under CAFA exists. We conclude Best Buy Stores does not have its principal place of business in California.

A limited partnership or a corporation is a citizen of (1) the state under whose laws it is organized or incorporated; and (2) the state of its "principal place of business." 28 U.S.C. § 1332(c)(1).

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[2] The local controversy exception bars the exercise of federal jurisdiction when greater than two-thirds of the class members are citizens of the state in which the action was originally filed, the principal injuries about which the plaintiffs complain occurred in the state in which the action was originally filed, and at least one defendant, from whom significant relief is sought and whose conduct is forms a significant basis for the claims asserted, is a citizen of the state in which the action was originally filed. 28 U.S.C. § 1332(d)(4).

Supplemental Appendix

In this circuit, we apply two tests to determine the state of a corporation or partnership's principal place of business. First we apply the "place of operations" test. Under that test, a corporation's principal place of business is the state containing "'a substantial predominance of corporate operations.'" *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001) (per curiam) (quoting *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990)). If no state contains a "substantial predominance" of corporate operations, we apply the "nerve center" test, which locates the corporations principal place of business in the state where "the majority of its executive and administrative functions are performed." *Id.*

Determining whether a "substantial predominance" of a corporation's operations take place in a given state "plainly requires a comparison of that corporation's business activity in the state at issue to its business activity in other individual states."[3] *Id.* We employ a number of factors to determine if a given state contains a substantial predominance of corporate activity, including: "the location of employees, tangible property, production activities, sources of income, and where sales take

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[3] Were we writing on a clean slate, we would find much in favor of the rule suggested by the concurrence. But we see ourselves as bound by the holding in *Tosco*.

place." *Id.* Substantial predominance does not require the majority of the corporation's operations to occur in a single state, but the corporation's activity in one state must be "substantially larger" than the corporation's activity in any other state. *Id.*

Applying this standard, the district court concluded Best Buy Stores had a "substantial predominance" of its activities in California. Best Buy Stores has more stores in California than in any other state, more employees in California than in any other state, and more sales in California than in any other state. As the district court explained, "California has 15% more stores, 40% more employees, and 46% more sales than Texas, the second highest state."

The substantial predominance test does not require that a majority of corporate operations occur in a single state. But the test requires a "substantial" predominance, not mere predominance. In *Tosco*, for example, we held that a gasoline manufacturer and retailer was a citizen of California when 21% of its employees, nearly 50% of its refining capacity, half its lubricant blending facilities, 35% of its retail locations, 15% of its convenience stores, and 35% of its inventories were located in California. 236 F.3d at 501–02. In that case, the defendant also had management operations in California and, in previous litigation, had maintained that it was a citizen of California. *Id.* at 502–03. Tosco's operations

reflected not only that it had more operations in California than in any other state, but that it had substantially more operations.

Accordingly, we have stated that when a corporation has operations spread across many states, the nerve center test is usually the correct approach. *Breitman v. May Co. Cal.*, 37 F.3d 562, 564 (9th Cir. 1994) ("May Company has corporate operations in over thirty states. Because no one state contains a substantial predominance of the corporation's business activities, the place of operations test inappropriate."). *Cf. Industrial Tectonics*, 912 F.3d at 1093 ("ITI's operations are divided between only two states: California and Michigan. ITI's operations are not so spread out that one must look to the corporate headquarters to find a principal place of business . . . ."). When a corporation's activities are spread over many states, it is much less likely operations in any one state will "substantially" predominate over operations in other states.

We have not previously given precise definition to the meaning of the term "substantially" in the substantial predominance test. We do not here adopt any hard and fast rule or percentage by which the operations in one state must exceed those in other states. But in determining whether a corporation's operations "substantially" predominate, we must take into consideration both the nature of

the corporation's business activities and the purposes of the corporate citizenship statute. The purpose of diversity jurisdiction, and the citizenship determinations associated with it, is to avoid the effects of prejudice against outsiders. *Industrial Tectonics*, 912 F.2d at 1094. Thus, the term "substantially" must be defined with an eye to ensuring that a corporation is a citizen of the place in which it is least likely to suffer prejudice. *See id.*

It is clear that Best Buy Stores's California operations predominate over its operations in other states. But we cannot say that these operations "substantially" predominate over Best Buy Stores's operations in other states. Best Buy Stores is a nationwide retailer with stores in 49 states, the District of Columbia, and Puerto Rico. At most, the statistics demonstrate that Best Buy Stores's California retail activities roughly reflect California's larger population. If a corporation may be deemed a citizen of California on this basis, nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes. Such a result is untenable. With operations distributed widely across the country, Best Buy Stores is no more familiar to Californians than it is to Texans or Illinoisan, and hence no less

likely to suffer prejudice in California than elsewhere.[4]

We do not require that courts apply a per capita approach to determining a corporation's principal place of business in every case. However, we hold that a nationwide retailer with operations spread across many states will be a citizen of California only when a substantial predominance of its activities are located in California; it will not be a citizen of California merely because its operations in California cater to California's larger population.

Accordingly, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED and REMANDED

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[4] Indeed, both of these states have more Best Buy stores per capita than does California. Best Buy has fewer stores in California per person than it does on average nationwide.

Supplemental Appendix

Davis v. HSBC Bank, 08-57062

KLEINFELD, J., writing separately:

I concur in the result. My reasoning is somewhat different.

The majority opinion extends Tosco Corp. v. Communities for a Better Environment[1] beyond its facts. In my view, Tosco was overwritten, and I would confine it to its facts. In Tosco, an oil company was suing an environmental advocacy group for defamation and related torts, and claimed to be a citizen of Connecticut in order to get diversity jurisdiction.[2] We affirmed a district court decision, which held that the oil company had its principal place of business in California, and adopted as our own the district court decision, rather than writing a decision independently.[3] The most striking fact in the case, more than the difference in percentage of refineries, gas stations and employees between one state and another, is that Tosco had itself successfully claimed in previous litigation that its

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[1] 236 F.3d 495 (9th Cir. 2001) (per curiam).

[2] Id. at 497, 500.

[3] Id. at 497. Compare id. at 497-502 with Tosco Corp., v. Cmtys. For a Better Env't, 41 F. Supp. 2d 1061 (C.D. Cal. 1999).

principal place of business was California.[4] All that the district court and we had to decide in Tosco was whether some corporate changes in the three years between the two lawsuits changed the oil company's citizenship. The corporate changes did not amount to enough to change its citizenship. A district court decision often includes, quite properly, multiple reasons for affirmance, but an appellate decision has different purposes. We should have picked the best reason, that Tosco was still a citizen of the state where three years earlier it successfully claimed t be one. Since we did not, we must struggle with Tosco and follow it if it applies, but I think we could confine Tosco to its facts and distinguish it.

We held in Industrial Tectonics, Inc. v. Aero Alloy that the a corporation's "principal place of business" is "where a *majority* of a corporation's business activity takes place in one state."[5] Tosco says the opposite, that the "principal of business" "does not require the majority of a corporation's total business activities to be located in one single state,

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[4] Id. at 502.

[5] 912 F.2d 1090, 1092 (9th Cir. 1990) (emphasis added); see also Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co., 117 F.3d 1128, 1134–35 (9th Cir. 1997) (following the "majority" holding in Industrial Tectonics); Danjaq, S.A. v. Pathe Commc'ns Corp., 979 F.2d 772, 776 (9th Cir. 1992) (following the "majority" test from Industrial Tectonics).

but instead, requires only that the amount of [the] corporation's business activity in one state be significantly larger than any other state in which the corporation conducts business."[6] Without the per capita qualification the majority articulates, that means that the "principal place of business" of most national corporations would be in the most populous state, California. Even with it, this approach makes the wrong comparison, largest to next-largest state, instead of the right one, state to everywhere the business operates, to determine "principal place of business" by the "place of operations" test.

Comparing one state to another unreasonably lends itself to designating a "principal place of business" with the "place of operations" test when the "nerve center" test ought to be used. There is no reason why the burden of proof should be on the party urging use of the "nerve center" test, or why the "place of operations" test ought to be the default.[7] For a national corporation, the opposite presumption makes more sense. The Seventh Circuit uses only the "nerve center" test.[8] There can only be *one* "principal

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[6] Tosco, 236 F.3d at 500.

[7] See Tosco, 236 F.3d at 499.

[8] See, e.g., Metro. Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1223 (7th Cir. 1991). The First, Second, and Fourth Circuits apply the nerve center test when a corporation's operations are decentralized and spread across multiple states.

place of business," and for a corporation that operates in multiple states "principal" does not merely mean the state with more of some activities than any other individual state. State-to-state comparison, as suggested in Tosco and followed by the majority, only assures identification of the state that has "substantially" more than the state it is compared to. Identification by this comparison of the state that substantially predominates for the *entire* corporation (which, as "principal" suggests, is what we are trying to identify) will have little to do with the correctness of the methodology, and more to do with fortuity. Rather than limiting application of what is plainly the wrong test for national corporations (the place of operations test), the majority opinion extends Tosco. This extension generates excessive unpredictability and encourages expensive litigation to identify the "principal place of business" for corporations that operate in multiple states. One great appeal of the nerve center test is that it is generally faster, more certain, and cheaper to apply than the place of operations test.

See, e.g., Diaz-Rodriguez v. Pep Boys Corp., 410 F.3d 56, 61 (1st Cir. 2005); Athena Auto., Inc. v. DiGregorio, 166 F.3d 288, 290–91 (4th Cir. 1999); R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 655 (2d Cir. 1979).

Supplemental Appendix

FACTS

Plaintiff Gary Davis sued Best Buy and HSBC, the bank that issues the Best Buy credit card, in the Superior Court of the State of California. The complaint claims that Best Buy and HSBC defrauded their California customers by offering them credit cards without adequately disclosing the annual fee they would be charged. The case was brought as a class action, on behalf of all Californians who obtained the credit card and were charged a fee. The defendants removed the case to the United States district court pursuant to 28 U.S.C. § 1453(b),[9] a provision of the Class Action Fairness Act of 2005.[10]

All that matters on appeal is whether Best Buy is a citizen of the State of California. There are actually two Best Buy defendants in this case, a corporation that is a holding company, and a limited partnership that owns and operates the national chain of Best Buy retail stores. The parties do not put at issue the holding company's Minnesota citizenship. They dispute only whether the limited

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[9] 28 U.S.C. § 1453(b); see Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 681 (9th Cir. 2006) (explaining the relationship between 28 U.S.C. § 1332(d) and § 1453(b)).

[10] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

partnership is a citizen of California.[11] The limited partnership operates retail stores in 49 of the 50 states, plus Puerto Rico and the District of Columbia. The stores sell consumer electronics such as television sets and computers, video games, DVD's, cameras, and home appliances.

Generally, a company is a "citizen" of at most two states, the state of incorporation for corporations[12] or state of organization for unincorporated associations,[13] and the state where it

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[11] Since only the citizenship of the limited partnership is at issue, "Best Buy" will be used to refer to the limited partnership, Best Buy Stores L.P., unless otherwise indicated.

[12] We do not consider corporations incorporated in multiple states or address whether such corporations are citizens of every state in which they have been incorporated. See Charles Alan Wright et al., 13B Federal Practice and Procedure § 3626 (2d ed. & Supp. 2008).

[13] 28 U.S.C. § 1332(d)(10) ("For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.") The Best Buy limited partnership is organized under the laws of Virginia. For qualifying class actions such as this one, CAFA abrogates the traditional rule that an unincorporated association shares the citizenship of each of its members for diversity purposes, and renders inapplicable the procedure in Federal Rule of Civil Procedure 23.2, which generally determines whether a federal court has subject

has its "principal place of business."[14] Since Best Buy is organized under the laws of Virginia,[15] and is therefore a citizen of Virginia, the only issue is whether its "principal place of business" is California.[16] The argument for California citizenship is basically that Best Buy operates more stores, employs more people, and sells more goods in California than in any other state. All of this is true. The argument against is basically that California is only a small part of Best Buy's national operations, sales, and workforce, and its national locus of decision making is in Minnesota. This is also true.

There can be only one "principal place of business" for diversity purposes, which of course is

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matter jurisdiction over an action involving an unincorporated association. See Wright et al., *supra* note 12, at § 3630, at 667.

[14] Id. § 1332(c)(1) (providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").

[15] Cf. § 1332(d)(10).

[16] We apply the same tests to determine the "principal place of business" for corporations and unincorporated associations. See, e.g., United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 763 (9th Cir. 2002).

what the word "principal" implies.[17] Best Buy has about 11% of stores, 13% of sales and 13% of employees in California, compared with about 10% of stores, and 9% of both sales and employees in its next-most active state (Texas). This works out to be roughly 16% more stores, 45% more sales, and 45% employees than Texas. Though its California business greatly exceeds its Texas business, Best Buy does 87% to 89% of its business and has all of its central management outside of California. "Principal," the statutory term, means principal for the corporation's entire business, not "more than any other single state."

ANALYSIS

Under our precedents, we use the "place of operations" test to determine a corporation's "principal place of business" if (and only if) one state has a substantial predominance" of the corporation's

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[17] Because we interpret the term "principal place of business," this holding applies to both corporations and unincorporated associations. See 28 U.S.C. § 1332(c)(1) & (d)(10) (providing that for the purposes of CAFA an unincorporated association "shall be deemed to be a citizen of the State where it has its principal place of business); see, e.g., Capitol Indem. Corp. v. Russellville Steel Co., 367 F.3d 831, 836–37 (8th Cir. 2004); Gafford v. Gen. Elec. Co., 997 F.2d 150, 161 (6th Cir. 1993); J.A. Olson Co. v. City of Winona, 818 F.2d 401, 406 (5th Cir. 1987); cf. Breitman v. May Co. Cal., 37 F.3d 562, 564 (9th Cir. 1994).

business activities.[18] If no state has a "substantial predominance" we use the "nerve center" test to determine that corporation's "principal place of business."[19] Our sister circuits generally apply some combination of the nerve center,[20] the "corporate activities" or place of operations,[21] and the "total

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[18] Tosco Corp. v. Cmtys. for Better Env't, 236 F.3d 495, 500 (9th Cir. 2001) (per curiam); see also United Computer Sys., 298 F.3d at 763; Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co., 117 F.3d 1128, 1134 (9th Cir. 1997); Breitman, 37 F.3d at 564.

[19] See Tosco, 236 F.3d at 500.

[20] The Seventh Circuit applies the nerve center test. See, e.g., Metro. Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1223 (7th Cir. 1991).

[21] The Third Circuit applies a variant of the place of operations test, which it calls the "center of corporate activities" or "operating assets" test. See, e.g., Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 291 (3d Cir. 1998); Kelly v. U.S. Steel Corp., 284 F.2d 850, 853–54 (3d Cir. 1960). It primarily looks for "the headquarters of day-to-day corporate activity and management." See Mennen, 147 F.3d at 291. The First, Second, and Fourth Circuits have adopted both the nerve center test and place of operations test. See, e.g., Diaz-Rodriguez v. Pep Boys Corp., 410 F.3d 56, 61 (1st Cir. 2005); Athena Auto., Inc. v. DiGregorio, 166 F.3d 288, 290–91 (4th Cir. 1999); R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 655 (2d Cir. 1979); see also Mullins v. Beatrice Pocahontas Co., 489 F.2d 260, 262 (4th Cir. 1974). Which test they apply depends on the structure of the corporation. See, e.g., Athena Auto., 166 F.3d at 290–91. They apply the nerve center test when corporate

activity" tests.[22] Despite varying verbal formulas, their approaches generally amount to about the same thing as Industrial Tectonics, Tosco, and this separate opinion.[23]

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operations are decentralized and spread across a number of states. See, e.g., Diaz-Rodriguez, 410 F.3d at 61. When a corporation has substantially all of its physical operations concentrated in one state, they apply the place of operations test. See, e.g., Peterson v. Cooley, 142 F.3d 181, 184–85 (4th Cir. 1998).

[22] The total activities test incorporates both the nerve center and corporate activities test. Courts in the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits apply this test. See, e.g., Capitol Indem., 367 F.3d at 835–36; Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 914–15 (10th Cir. 1993); Gafford, 997 F.2d at 162–63; J.A. Olson, 818 F.2d at 411–12; Vareka Invs., N.V. v. Am. Inv. Props., Inc., 724 F.2d 907, 909–10 (11th Cir. 1984); see also Assoc. Petroleum Producers, Inc. v. Treco 3 Rivers Energy Corp., 692 F. Supp. 1070, 1074–75 (E.D. Mo. 1988). The total activities test considers factors such as the location of the corporation's "nerve center," administrative offices, production facilities, personnel, tangible property, sales, income earned, and balances these factors based on the facts of the case. See, e.g., Amoco Rocmount, 7 F.3d at 915.

[23] See Danjaq, S.A. v. Pathe Commc'ns Corp., 979 F.2d 772, 776 (9th Cir. 1992) (deriving the "general rule" that a corporation's principal place of business is the location of the "bulk of corporate activity, as evidenced by the location of daily operating and management activities"); Indus. Tectonics, 912 F.2d 1090, 1092 n.3 (9th Cir. 1990) (noting that the place of operations and nerve center tests "can be viewed as particular

Supplemental Appendix

I. Industrial Tectonics and Tosco

In Industrial Tectonics, Inc. v. Aero Alloy,[24] the corporation's business activities were located in just two states, California and Michigan. We concluded that California was the corporation's principal place business for the purpose of diversity jurisdiction, after noting that California accounted for 61% of sales, 69% of operating income, 64% of receivables, and the location of 75% of its inventory.[25] The California plant also had nearly double the book value of the corporation's only other plant in Michigan, and employed more than 50% of the corporation's employees.[26] Thus, by every measure, well over half of the corporation's business activities were in California. We held that "where a majority of a corporation's business takes place in one state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state."[27] We did not apply the nerve center

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applications of a general rule that the 'bulk of corporate activity,' as evidenced by operating, administrative, and management activities, determines a corporation's principal place of business").

[24] 912 F.2d 1090.

[25] Id. at 1094.

[26] Id.

[27] Id.

test because California contained a substantial predominance of the corporation's business activities.[28] Our approach in Industrial Tectonics was consistent with our prior decisions, in which corporations with "substantially all" of their one (and only) business activity in a single state were found to have their "principal place of business" in that one state where all the operations were located.[29]

In Tosco Corp. v. Communities for a Better Environment[30] we held that the "place of operations" test determines a corporation's principal place of business "when a corporation conducts a substantial predominance of its business within a state."[31] The emphasis in Tosco on "substantial predominance," rather than "majority," as in Industrial Tectonics, arose because the corporation's business activities in Tosco were more complex than in Industrial Tectonics. According to the district court opinion we adopted, Tosco's refinery business had a majority of

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[28] Id.

[29] Bialac v. Harsh Bldg. Co., 463 F.2d 1185, 1186 (9th Cir. 1972); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1301 (9th Cir. 1989); Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 842 (9th Cir. 1986).

[30] 236 F.3d 495 (9th Cir. 2001) (per curiam).

[31] Id. at 497.

its refineries (63%), half of its lubricant blending and packaging facilities, and almost half (40%) of its refining capacity in California, but only about a third (37%) of its retail locations and inventory. California had more than twice the number of retail locations of any other state.[32] Thus, in Tosco we applied the "substantial predominance" inquiry mentioned but not used in Industrial Tectonics to analyze a corporation operating in more than two states, with the majority of its most important business factor (refineries, since Tosco was an oil company) and 50% of the important and refinery-related production facilities were in California. At least on the facts considered in Tosco, we concluded that a majority of each and every corporate activity was not required to establish a "substantial predominance."[33]

Neither Industrial Tectonics nor Tosco addressed companies with no majority of *any* activity in one state. Tosco was in the business of making and selling petroleum-based products, and Industrial Tectonics was in the business of making ball bearings. Both performed these activities largely in California, where the bulk of their production facilities were located. Best Buy does not conduct any of its activities largely in California. Though Tosco

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[32] Id. at 501.

[33] Id. at 500.

says, perhaps in dicta, that a majority of the corporation's *total* activities are not necessary (Tosco did in fact maintain a majority of its refineries in California), we have never said what "substantial predominance" requires when no state had a majority of *any* activity.

Under Tosco and Industrial Tectonics, application of the "place of operations" test[34] requires "substantial predominance" of the corporation's activities in one state.[35] "Substantial predominance" itself requires two things, both that activities in one state predominate, and also that this predominance be "substantial."[36]

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[34] Under the "place of operations" test, a corporation's principal place of business is the state with a "substantial predominance of corporate operations." Indus. Tectonics, 912 F.2d at 1092-93; see also Danjaq, S.A. v. Pathe Commc'ns Corp., 979 F.2d 772, 776 (9th Cir. 1992); Co-Efficient Energy Sys. v. CSL Indus., Inc., 812 F.2d 556, 558 (9th Cir. 1987).

[35] Tosco, 236 F.3d at 502; Indus. Tectonics, 912 F.2d at 1094; see also Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co., 117 F.3d 1128, 1134–35 (9th Cir. 1997).

[36] Cf. Duncan v. Walker, 533 U.S. 167, 174 (2001) (recognizing the duty to give effect, if possible, to every clause and word of a statute); Exxon Corp. v. Hunt, 475 U.S. 355, 369 n.14 (1986) (rejecting the reading of a phrase that made a latter phrase surplusage); United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003) (recognizing the same canon of statutory construction).

Supplemental Appendix

II. Predominance

The term "predominance" invites arithmetic, but not merely arithmetic. Judgment is necessary to decide which numbers matter.

In this case, the district court considered that Best Buy generates most of its net sales, roughly 13%, in California and 9% of its net sales in Texas, the next-most productive state. Taking the difference, 4%, it calculated that California accounted for 45% more business than Texas. Based on the 45% difference between California (the highest[37] state) and Texas (the next-highest state), it concluded that California had a substantial predominance of Best Buy's sales. The court applied similar arithmetic, with similar results, to the number of Best Buy employees and stores in California. Based on these percentages of percentages, it concluded that California was Best Buy's principal place of business.

It is error to determine predominance merely by comparing one state to another. "Principal place of business" means principal place of business for the *entire* company. That may be the whole country for a

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[37] I use "highest" to mean the state with the most of that factor. Factors include number of employees, retail stores, inventory, sales, production facilities. See Tosco, 236 F.3d at 500–01.

nationwide business, and all of the states with its operations for a multi-state business. In the context of determining a corporation's "principal place of business," "predominance" should be judged against the corporation's entire operations, not merely by a comparison of the two highest states. For Best Buy, determining predominance requires comparing its California business to the other 48 states, Puerto Rico, and the District of Columbia.

A comparison between the two highest states cannot tell us whether the highest state has a "substantial predominance" because it tells us only how one state compares to another, not whether any state so predominates that it is reasonable to call a multistate company a citizen of that one state. If a retailer has operations in all the states proportional to population, and we determine "predominance" just by taking the difference between the two highest states, California would be the "principal place of business" for virtually every corporation because of its larger population. Because a comparison between the two highest states tells us nothing about whether the highest state predominates for the entire corporation (which is what matters), the comparison cannot tell us enough about "substantial predominance" to yield the principal place of business.

Determining "predominance" by comparing the operations in one state to the corporation's national

operations is consistent with what the court actually did in Tosco, even though the words can be read to say we should do what the district court did in this case. In Tosco, we said that "substantially predominates . . . requires a comparison of that corporation's business activity in the state at issue to its business activity in other individual states."[38] We applied this verbal formulation by calculating what percentage of Tosco's total, national operations occurred in California.[39] It was based on these percentage of Tosco's *entire* operations that the district court found California to predominate and that predominance to be substantial.[40]

A hypothetical case illustrates why looking at the difference between states fails to determine the "principal place of business." Suppose a craft bourbon distillery, mostly discovered by tourists who arrange shipments home, ships 1 case of bourbon to each of the 50 states, except for Alaska, where a pair of tourists each ordered a case. The distillery sells twice as much bourbon to Alaska as to any other state, but Alaska only accounts for about 4% of its total sales. Although Alaska greatly predominates when compared to any other individual state (2 cases

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[38] Tosco, 236 F.3d at 500.

[39] Id. at 501–02.

[40] Id.

to 1), it does not "predominate" in a relevant way, because 4% is not close to a majority of total sales. To say that Alaska is the "principal place of business" and "citizenship" of this distillery, when none of its employees have even taken a cruise there, and all of its manufacturing facilities and 96% of its sales occur elsewhere, would be a little silly. Yet under a state-by-state analysis, we would look only at the difference between the two highest states by subtracting the sales in the second-highest state (1 case) from the sales in Alaska (2 cases), and then dividing by the sales in the second-highest state (1 case). By this calculation 100% more sales occur in Alaska than any other state, so we would (erroneously) conclude that Alaska "substantially predominates" and is therefore the distillery's principal place of business and citizenship.

In order to calculate a useful percentage, one has to pick the numerator and denominator with a view towards what matters. Using the next-largest state as a denominator has only a slight bearing on what matters, substantial predominance of the business's entire operations. To determine whether operations in a state predominate, the proper numerator is business occurring in the state and the proper denominator is all the corporation's business.[41] Net sales, tangible property, personnel,

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[41] Our precedents use the same numerator and denominator. This merely makes explicit the method for

production facilities, and other factors may be helpful for determining whether a state is the "principal place of business."[42] Whatever the indicia are, the point of looking at them is to determine what state, if any, predominates relative to everywhere the corporation operates, not simply where the corporation has the most activities.

Thus, if a retail company has sales of $65 in California, $20 in Nevada, and $15 in Oregon, the relevant arithmetic is not ($65 – $20)/$20, which only tells us that 225% more sales occur in California than the next-largest state. It is $65/$100, which is California's percentage of $100, the company's *total* sales nationally ($65 + $20 + $15). Although both calculations tell us that California predominates in sales, only the latter provides a basis for concluding that California is the principal place of business because it is the only one that compares California's operations to the company's total operations in all states. The former calculation only shows how much

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calculating a useful percentage. See Tosco, 236 F.3d at 500–01; Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co., 117 F.3d 1128, 1135 (9th Cir. 1997); Indus. Tectonics, 912 F.2d at 1093–94.

[42] See Indus. Tectonics, 912 F.2d at 1094; see also Montrose Chem., 117 F.3d at 1135 (examining the location of the corporation's tangible property, production activities, employees, and income sources).

more activity occurs in the highest state than the second-highest state, which tells us nothing about whether any state has a predominance of its national operations.

If this retail company also had operations in Washington, and its sales were $40 in California, $25 in Nevada, $20 in Oregon, and $15 in Washington, the first way (looking at the difference between states) yields the wrong answer. It shows a 60% "predominance" by California in total sales, while the correct calculation suggests California does *not* predominate as to sales, because it only accounts for 40% of total sales. The 60% figure, which corresponds to California's predominance over Nevada, is of little use in determining the "principal place of business" for this regional corporation.

To determine whether Best Buy's California operations "predominate," the relevant comparison is between the percentage of Best Buy's total operations in California and the percentage occurring elsewhere, not merely to the second-highest state (Texas). For factors such as sales, employees, and stores, the numerator is the amount of sales, number of employees, and number of stores in California. The corresponding denominators are the total sales, total number of employees, and total number of stores for the entirety of Best Buy's operations.

Supplemental Appendix

As the majority says,[43] diversity jurisdiction enables citizens of non-forum states a better chance of avoiding "local prejudice." There is more to it, though, than avoiding the sort of prejudice Southerners might have had a half century or a century ago toward Yankees. Jurors may have no prejudice at all against citizens and corporations of other states, but still have a financial incentive to import their money. This incentive is especially strong when the corporate pockets are deep and the loss will not affect local employment. That may have been one of the reasons why Congress modified diversity jurisdiction in the Class Action Fairness Act.[44] Diversity protects against deep pocket justice as one form of prejudice.

III. Substantiality

Finding a state that predominates nationally does not suffice to establish the corporation's

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[43] Op. at 6.

[44] See S. Rep. No. 109-14, at 11–12 (2005) (Conf. Rep.) (noting that in section describing abuses of jurisdiction that "an important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court" and commenting on cases where the out-of-state defendant was confronted with "a state court system prone to produce gigantic awards against out-of-state corporate defendants" (alterations omitted)).

"principal place of business." The predominance, under Industrial Tectonics and Tosco, must also be "substantial."[45] "Substantial" does not mean just more than any other state. Like predominance, substantiality is judged by comparing the putative principal place of business to the rest of the corporation's activities.[46] The "totality of corporate activity," not just one or several components of that activity, must be substantial at the corporation's principal place of business.[47] Thus, in Tosco we held that the corporation's California operations were "substantial" because it had the majority of the corporation's most important activity, its refineries, and 50% of the important and related production facilities in California. In Tosco no other state had comparable percentages of the other factors considered — California had 40% of total refining capacity, and 37% of all retail locations.[48] Although California did not have a majority of every factor,

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[45] Tosco, 236 F.3d at 500; Indus. Tectonics, 912 F.2d at 1094.

[46] See Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (holding that a corporation's principal place of business "must be resolved on an over-all basis").

[47] Cf. id.; see also Indus. Tectonics, 912 F.2d at 1094 (examining all business activities occurring in California).

[48] Tosco, 236 F.3d at 500–02.

California's predominance in Tosco was "substantial" because it had a majority of one of them, and the other factors' percentages were close to a majority and "significantly larger" than the percentages in any other state.[49]

There are four reasons why substantiality is essential for proper application of the "substantial predominance" test. First, if mere predominance sufficed, no matter how slight, then a corporation's principal place of business might change from year to year, or month to month, based on the routine vicissitudes of commerce. Second, requiring a finding of mere predominance, rather than *substantial* predominance, would make it likely that district and circuit courts in multiple circuits might locate a corporation's principal place of business in different states, even though each corporation can have only one.[50] Third, a simple predominance test would result in California being the "principal place of business" for nearly every national retailer by virtue of its larger population. Fourth, a "slight" predominance standard would just encourage expensive and fundamentally wasteful discovery, motions practice, and appeals not even focused on

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[49] Id. at 500.

[50] See 28 U.S.C. § 1332(c)(1), (d)(10) (specifying that a corporation is a citizen of the state which is "its principal *place* of business" (emphasis added)).

whether or to what extent the defendant wronged the plaintiff, but instead on *where* a lawsuit about those matters ought to be conducted. Litigation is more than burdensome enough without adding a trial to decide where to have the trial.

The "substantiality" inquiry will not necessarily pinpoint a state in which a corporation's business activities substantially predominate so that it is the "principal place of business." The substantiality requirement should actually help identify when, despite a "predominance," the "place of operations" test is nevertheless inappropriate because the corporation's activities are not overwhelmingly concentrated in one place. As we explained in Tosco, predominance is not necessarily "substantial" if other states have comparable concentrations of the corporations' business activity.[51] Assuming a hypothetical business with 49% of its total activities in California, 46% in Nevada and 5% in Oregon has a "predominance" in California, we might still conclude that this predominance was not "substantial" because Nevada has a "comparable" percentage of the corporation's

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[51] Tosco, 236 F.3d at 500.

total activities and less than half of its activities are in California.[52]

To assess whether two states are "comparable," I would not depend on "per capita" analysis as the majority does. Dividing the amount of a business factor in a state by its population, or vice versa (and thus finding amount of sales "per person" or number of people "per store") at most identifies cases where the activity in a state is disproportionate to population. But disproportionateness on a per capita basis can arise for reasons having nothing to do with a state being the corporation's "principal place of business."

Consider a hunting and fishing outfitter with 1 lodge in every state except Wyoming, where it has 2. "Per capita," then, Wyoming is the highest state with 1 lodge per 260,000 people. The next-highest state has 1 lodge per 620,000 people. On a per capita basis, the majority's state-to-state comparison leads to the conclusion that the outfitter's physical operations in Wyoming do "predominate" and that this predominance is "substantial." But just as it was for the bourbon distillery, this conclusion makes little sense. It is just silly to call Wyoming the "principal place of business" for a company when 96%

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[52] Id. at 501–02 (examining whether other states had "comparable" concentrations of the corporation's entire operations when assessing substantial predominance).

of its employees have never set foot in Yellowstone, and 96% of its physical facilities and central reservation office are located elsewhere. A "per capita" analysis only tells us when a state has more or less of a given factor than other states. It does not tell us anything about what really matters, which is whether any state predominates for the entire corporation.

Many products appeal to specialized audiences, so that sales are disproportionately in a few states. For example, Porsches doubtless sell better to rich people, so richer states have disproportionately more Porsches, even with a per capita correction. Is Porsche's "principal place of business" California, Connecticut, or Washington D.C., just because more people in those places than in, say South Dakota or West Virginia, can afford Porsches? Because car battery blankets, oil pan heaters, and circulatory heaters sell disproportionately in Fairbanks, is Alaska the principal place of business for the Outside companies that make them? Not by a sensible attribution of "citizenship."

Because the "place of operations" test is only appropriate for corporations that are truly concentrated in one place, courts should not struggle with mathematical gyrations to determine whether a predominance is "substantial." Where predominance is not substantial enough to be pellucid, the "nerve

center" test applies.[53] Only if the "totality of corporate activity in a given place . . . m[ay] be said to represent the 'center of gravity' of corporate function" is the substantiality requirement met.[54]

The "nerve center" test[55] determines a corporation's "principal place of business" by looking to "where its executive and administrative functions are performed."[56] "In short, courts generally assign greater importance to the corporate headquarters when no state is clearly the center of corporate activity, and assign greater importance to the location of corporate business when substantially all business operations take place in a single state."[57] In

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[53] Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862, 865 (S.D.N.Y. 1959); see also Tosco, 236 F.3d at 500 (requiring the corporation's business activity in its principal place of business be "significantly larger" than its activities nationally); Danjaq, S.A. v. Pathe Commc'ns Corp., 979 F.2d 772, 776 (9th Cir. 1992) (concluding that the location of the "bulk" of a corporation's activities was its principal place of business).

[54] Scot Typewriter, 170 F. Supp. at 865.

[55] Tosco, 236 F.3d at 502; Indus. Tectonics, 912 F.2d at 1094; see also Montrose Chem., 117 F.3d at 1134–35; Scot Typewriter, 170 F. Supp. at 865 (setting forth the "nerve center" test).

[56] Indus. Tectonics, 912 F.2d at 1092.

[57] Id. at 1093.

Industrial Tectonics, we held that because "a majority" of the corporation's business activity took place in one state, that state was its principal place of business, even though the corporate headquarters were located in a different state.[58] When no state has a substantial predominance of the corporation's total activities, we apply the nerve center test to determine the "principal place of business."

IV. Best Buy

To determine if Best Buy has its principal place of business in California, we look at whether California contains a "substantial predominance" of Best Buy's business activities. Best Buy's business activities consist of its chain of Best Buy retail stores that sell movies, music, and electronics in 49 states, Puerto Rico, and the District of Columbia. There are a total of 923 retail stores distributed throughout these states and territories. These retail stores employ 126,837 people nationwide, and generated about $31.7 billion in net sales in 2008. To service these retail stores, Best Buy Stores owns or leases 9 distribution centers, which have 6.3 million square feet of space.

California has 103 of Best Buy's 923 total retail stores, or 11%. Of Best Buy's 126,873

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[58] Id. at 1094.

employees, 16,033 (13%) are in California. Of its $31.7 billion in total sales, California accounts for $4.21 billion (13%).

Unlike in Industrial Tectonics and Tosco, Best Buy does not have a majority of any activity (employees, stores, etc.) concentrated in California. Instead, somewhere around 87% to 89% of Best Buy's total operations are *outside* of California, as is all of its national management. With far more than half of all activities occurring outside of California, I cannot conclude that Best Buy's California operations predominate, let alone "substantially" predominate. Were we to accept the district court's conclusion that Best Buy is a California citizen because it does more business there than in Texas, the Eighth Circuit and the district courts in Minnesota, where all of Best Buy's national management and administration take place, would rightly scoff.[59]

I do not get to comparisons of one state to another, as the majority does and we did in Tosco, because California does not have a predominance of any factor in Best Buy's total activities. Absent "predominance," there is no occasion to judge whether the (nonexistent) predominance is "substantial," which one might do by asking if states

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[59] See, e.g., Capitol Indem. Corp. v. Russellville Steel Co., 367 F.3d 831, 835–37 (8th Cir. 2004) (applying total activities test to determine the "principal place of business").

have "comparable" percentages of the corporation's entire operations.[60] Finding two states that are "comparable" means any predominance is unlikely to be substantial.

Since there is no state in which Best Buy conducts a substantial predominance of its business activities, I would apply the nerve center test to determine its "principal place of business." Minnesota, the location of Best Buy's corporate headquarters, is thus its principal place of business. Best Buy is a citizen of Virginia, where it is organized, and Minnesota, where it is managed. A company only gets two citizenships, so it cannot have a third where it merely has more of some activity or activities than any other single state.

Though I concur in the result, I would confine Tosco to its facts, and clarify both the "place of operations" test itself and when it applies. Comparison of individual states generates expensive, unpredictable, and pointless litigation about corporate citizenship, likely to lead to intercircuit conflicts about where national business are citizens.

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[60] See Tosco, 236 F.3d at 501–02.

AMICUS CURIAE BRIEF

(8)

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IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

No. 08-1107

THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN TRUCKING ASSOCIATIONS, AND TRUCK RENTING AND LEASING ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying

[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than *amici curiae* and their members, or its counsel made a monetary contribution to its preparation or submission. This brief is filed with the consent of the parties.

membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. One of the principal functions of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

Business Roundtable is an association of chief executive officers of leading U.S. companies with more than $5 trillion in annual revenues and nearly 10 million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all corporate income taxes paid to the federal government. Annually, they return $133 billion in dividends to shareholders and the economy. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research and development spending—more than a third of the total private R&D spending in the U.S.

American Trucking Associations, Inc. ("ATA") is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,500 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States,

including for-hire carriers, private carriers, leasing companies and others. The ATA regularly advocates the trucking industry's position before this Court and other courts.

The Truck Renting and Leasing Association ("TRALA"), headquartered in Alexandria, Virginia, is a national trade association founded to serve as a unified voice for the truck renting and leasing industry. Its mission is to foster a positive legislative and regulatory climate within which companies engaged in leasing and renting vehicles and trailers and related businesses can compete fairly. TRALA members engage in commercial truck renting and leasing, vehicle finance leasing, and consumer truck rental. The membership encompasses the full spectrum of the industry, including major national independent firms as well as small and medium-size businesses that generally participate as members group systems. In total, these 400-plus companies operate more than 4,000 commercial lease and rental locations and more than 18,000 consumer rental locations throughout the United States, Canada and Mexico.

Amici and their members have strong interests in this case. All *amici* have members who are, or who lead, corporations with nationwide activities. The statute at issue applies only to corporations, and determines the fundamental issue of diversity jurisdiction according to a corporation's "principal place of business." *Amici* believe that jurisdictional tests such as this one should be certain and easy to apply at the outset of a case. *Amici* therefore urge the Court to establish a simple, predictable, and stable test under which a corporation's principal place of business is its headquarters, rather than the

ever-changing and uncertain result of a vague multi-factor statistical analysis of the corporation's operations and activities nationwide.

SUMMARY OF THE ARGUMENT

Under 28 U.S.C. § 1332(c)(1), a corporation is a citizen, for purposes of diversity jurisdiction, of the state "where it has its principal place of business." Under this plain language, a corporation is a citizen of the single state in which its sole, principal place of business is located. The statute looks to the specific location *within* a particular state which, out of all of the many places the corporation does business, is its principal place of business. It does not look to operations spread out over an entire state. Thus, the tests employed by the Ninth and other circuits—which amalgamate statewide activities rather than identify a specific principal location within a state—contravene the statute's plain terms. When this improper focus on operations is disregarded, it becomes clear that the corporation's headquarters is its true, principal place of business.

The headquarters, or "nerve center," test also best effectuates the need for certainty, stability, and efficiency in determining the threshold question of jurisdiction. Parties deciding where to file or remove a case must be able to make that initial determination easily without resorting to statistical analyses of constantly changing and often non-public data on corporate operations. The nerve center test, which looks to the readily-ascertainable location of a corporation's headquarters, serves these purposes while staying true to Congress's intent. The operations-based tests contrived by various circuits, which involve an imprecise weighing and balancing of multiple factors, do not. Congress did not intend

the determination of corporate citizenship to involve such number-crunching, litigation-inducing calculations. These tests cannot produce predictable results, require continual reassessment from case to case, spawn costly discovery and mini-trials just to determine jurisdiction, and raise the constant specter of reversal years later. And as in this case, such inquiries often improperly deem nationwide companies to be local "California" corporations merely because they cater to California's large population.

The nerve center test also comports with Congress's expressed intent while effectuating the basic premise of diversity jurisdiction. In basing corporate citizenship on the principal place of business, Congress expressly rejected proposals for operations-based tests because they lacked certainty. The nerve center test also serves the underlying goal of diversity jurisdiction: to protect defendants from the potential for local bias or prejudice against outsiders. The location of a corporation's headquarters, like an individual's choice of domicile, is a signature choice that reflects its roots and public personality. It is that place, rather than the product of a nebulous statistical analysis of corporate operations, where the corporation is, on balance, least likely to experience local prejudice and therefore least likely to need the protections of diversity jurisdiction.

ARGUMENT

I. A CORPORATION'S "PRINCIPAL PLACE OF BUSINESS" IS ITS HEADQUARTERS, OR "NERVE CENTER."

The governing statutory language is clear: for purposes of diversity jurisdiction a corporation is deemed a citizen of "any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). This jurisdictional rule is "unambiguous and not amenable to judicial enlargement." *Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 94 (2005).

Yet the tests employed by the Ninth and other circuits—which attempt to locate a company's principal place of business by amalgamating statewide operations—do just that. The statutory language unambiguously provides that a corporation is a citizen of the state "where" it "has" its one principal place of business. As petitioner has explained, this language identifies a single place, within a single state, in which the corporation's single principal place of business is located. *See* Pet. Br. 14-20. The statute does not look to operations over an entire state, but rather to a singular, principal location *within* a state. Thus, when the Ninth Circuit held that "*California* is Hertz's principal place of business," Pet. App. 3a, it contravened the statute's clear language. Under the statute, Hertz's principal place of business is *in* a state, but it cannot be the entire state itself.

When that error is corrected, it becomes clear that the individual physical location that can best be considered a corporation's principal place of business—out of the many different locations where

it conducts business—is the corporation's headquarters, often referred to as its "nerve center." That is the test the Seventh Circuit exclusively uses to determine a corporation's principal place of business, and it is the one that best comports with the unambiguous language of the statute. *Metro. Life Ins. Co.* v. *Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) ("a corporation has a single principal place of business where its executive headquarters are located"); *Wis. Knife Works* v. *Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) ("[W]e look for the corporation's brain, and ordinarily find it where the corporation has its headquarters.").[2]

By contrast, under the Ninth Circuit's test, the company's nerve center is its principal place of business only "if no state contains a 'substantial predominance' of corporate operations." *Davis* v. *HSBC Bank*, 557 F.3d 1026, 1028 (9th Cir. 2009) (quoting *Tosco Corp.* v. *Cmtys. for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001)). Other circuits similarly hold that the nerve center is presumptively the principal place of business, but that this determination can be trumped by an *ad hoc* statistical weighing of the corporation's current activities or operations within all 50 states. *See infra* at 12-13. These various qualifications on the

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[2] This test is not of recent vintage, but rather dates to one of the first decisions ever to have construed the 1958 amendment that added Section 1332(c)(1). *See Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (rejecting operations-based test as "misplaced and quite unrealistic" and holding that a corporation's "principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective").

nerve center test do not comport with the statute, because they base citizenship on an amalgamation of a corporation's operations or activities within a state, rather than on a singular, principal location within a state. When those improper qualifications are removed, the nerve center remains the singular place of business within a state that can best be considered the corporation's principal one. It is thus not necessary for the Court to cultivate a new test; the Court needs only to prune away the "operations" or "activities" tests employed by various circuits in order to preserve the good fruit.

The Court's decision in *Wachovia Bank* v. *Schmidt*, 546 U.S. 303 (2006), supports this plain reading. There, the Court interpreted the special statute governing citizenship of national banks, under which they are "deemed citizens of the States in which they are respectively located." 28 U.S.C. § 1348. The Court held that, under this statute, a national bank is "located" at its "main office," and therefore is a citizen of only the state containing that office rather than of all states where it does business. In so holding, the Court specifically noted that the bank's "main office" (a defined term under the National Bank Act) is synonymous with the "principal place of business" under Section 1332(c)(1): "[t]he absence of a 'principal place of business' reference in § 1348 may be of scant practical significance for, in almost every case, as in this one, *the location of a national bank's main office and of its principal place of business coincide*." *Wachovia*, 546 U.S. at 317 n.9 (emphasis added).

So too here, a corporation's principal place of business for purposes of diversity jurisdiction is a single, main office within a state, not an amalgama-

tion of operations spread across a state. The Ninth Circuit found that Hertz was a citizen of California because of the relative size of its widely-dispersed operations in that large state. But those operations do not constitute a single "place" of business within California, much less one that could be considered Hertz's "principal" place in the entire nation. Rather, of all the many different physical locations throughout the country where a corporation may do business, only its headquarters should be considered its sole, principal place of business.

II. THE NERVE CENTER TEST, UNLIKE OPERATIONS-BASED TESTS, PRODUCES PREDICTABLE AND STABLE RESULTS WITHOUT REQUIRING MINI-TRIALS TO DETERMINE JURISDICTION.

The citizenship of a corporation should be readily ascertainable and stable. Questions of jurisdiction should involve "no arduous inquiry." *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999); *Sinochem Int'l Co., Ltd.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007). There should not have to be mini-trials just to determine the threshold issue of jurisdiction.[3] Nor should a test yield results

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[3] *See Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (rejecting jurisdictional test that "jettison[s] relative predictability for the open ended rough and tumble of factors, inviting complex argument in a trial court"); *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring) ("a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there"); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring) ("We have sharp lines drawn upon the fundamental consideration of the jurisdiction" and should "get rid of all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them").

that may constantly change from case to case. *See, e.g.*, *Houston* v. *Lack*, 487 U.S. 266, 279-80 (1988) (Scalia, J., dissenting) (need for uniformity apparent when statutory provision "bearing upon the very jurisdiction of the courts is at issue," because "allowing courts to give different meanings from case to case allows them to expand and contract the scope of their own competence"). Rather, a "bright line" is needed for jurisdictional rules "so that very little thought is required to enable judges to keep inside it." *Sisson*, 497 U.S. at 375 (Scalia, J., concurring) (quoting Zechariah Chafee, *The Thomas M. Cooley Lectures, Some Problems of Equity* 312 (1950) (internal quotations omitted). Otherwise, courts run the risk of deciding cases beyond their jurisdiction and "an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases." *Id.*

These concerns are particularly crucial in the context of diversity jurisdiction. Plaintiffs and defendants must be able to correctly and easily determine a corporation's principal place of business before filing a case or removing one to federal court, without resort to complex statistical analyses of operations information that may be difficult, if not impossible, to obtain.[4] If that critical jurisdictional

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[4] Because jurisdiction cannot be predicated simply on a party's pleadings, factual issues sometimes arise. For example, the amount-in-controversy requirement for diversity jurisdiction will sometimes require modest discovery to determine whether the amount in fact exceeds the statutory threshold. Such limited discovery reduces the risk that plaintiffs will engage in "gamesmanship" by underestimating their damage claims to evade federal jurisdiction. By contrast, the burden placed on defendants to summon statistical proof of their

determination is incorrect, the parties face the specter of reversal years later, which could occur *sua sponte* at any time. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). And both corporations and their potential adversaries should have the assurance that a corporation's principal place of business, once fixed and determined, will not constantly change from case to case depending on the vagaries of economic trends and corporate asset allocations.

The nerve center test serves these purposes. The Seventh Circuit rightly prizes that test for its simplicity and predictability. "[P]arties ought to know definitely what court they belong in, and not face the prospect that their litigation may be set at naught because they made a wrong guess about jurisdiction." *Dimmitt & Owens Fin., Inc.* v. *United States*, 787 F.2d 1186, 1191 (7th Cir. 1986). "Some courts use a vaguer standard * * * we prefer the simpler test. Jurisdiction ought to be readily determinable." *Wis. Knife Works*, 781 F.2d at 1282. The ready determination of diversity jurisdiction in the Seventh Circuit favorably impacts litigation practice, by establishing clarity, efficiency, and stability. Unlike the other circuits' tests, few factual disputes arise under the nerve center test, and they are generally easy to resolve.[5] Moreover, corpora-

national operations to disprove citizenship is not contained by such workable limitations, and serves no comparable purpose.

[5] The nerve center test ably overcomes the situation where an asserted headquarters may only be nominal and is not really the "directing intelligence" of a corporation. *See Wis. Knife Works*, 781 F.2d at 1282-83; *Ace Rent-A-Car* v. *Empire Fire & Marine Ins. Co.*, 580 F. Supp. 2d 678, 687-88 (N.D. Ill. 2008) (holding, despite company president's assertion that Illinois

tions rarely change their headquarters, and such changes are carefully considered long-term policy decisions. *See* Pet. Br. 42-44; *infra* at 17-22.

By contrast, other circuits' tests require vague assessments of ever-changing corporate operations, making those operations determinative of the principal place of business in many cases. For example, the Third Circuit employs the "center of corporate activities" test, which considers the location of day-to-day corporate activities.[6] The First, Second and Fourth circuits apply either the nerve center or "place of operations" test on a discretionary, case-by-case basis.[7] Yet there are no clear standards for determining which test applies.

Other circuits employ a "total activities" test that attempts to combine the nerve center and "place of operations" tests.[8] This test employs "a somewhat

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was the principal place of business because his office was there, that Indiana was nerve center from where payments, communications and other governance were made); *Bond* v. *Veolic Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 913 (S.D. Ind. 2008) (discerning nerve center from among three candidates).

6 *See CGB Occupational Therapy* v. *RHA Health*, 357 F.3d 375, 381 n.5 (3d Cir. 2004); *Kelly* v. *U.S. Steel Corp.*, 284 F.2d 850, 853-54 (3d Cir. 1960).

7 *See Diaz-Rodriguez* v. *Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005); *R.G. Barry Corp.* v. *Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979); *Long* v. *Silver*, 248 F.3d 309, 314-15 (4th Cir. 2001).

8 *See J.A. Olson Co.* v. *City of Winona*, 818 F.2d 401, 409, 411 (5th Cir. 1987); *Gafford* v. *Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993); *Capitol Indem. Corp.* v. *Russellville Steel Co.*, 367 F.3d 831, 835-36 (8th Cir. 2004) ("open-ended" hybrid of the "nerve center" and "place of operations" test); *Gadlin* v. *Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000); *MacGinnitie* v. *Hobbs Group, LLC*, 420 F.3d 1234, 1239 (11th Cir. 2005).

subjective" analysis to choose between the results of the two inquiries. *MacGinnitie*, 420 F.3d at 1239. When considering a corporation whose operations are far-flung, "the sole nerve center of that corporation is more significant," but the principal place of business is ultimately subject to an analysis of the "nature" of the corporation's activities as a whole. *Olson*, 818 F.2d at 411. Under this vague test, courts are to "take into consideration all relevant factors and [weigh] them in light of the facts of each case." *Gafford*, 997 F.2d at 163.

The Ninth Circuit uses both the "place of operations" and nerve center tests, but applies them in a prescribed order of priority. *See Davis*, 557 F.3d at 1031; *Tosco*, 236 F.3d at 500. A court may only turn to the nerve center test if a defendant fails to meet its burden to prove that "no state contains a substantial predominance of the corporation's business activities." *Tosco*, 236 F.3d at 500. "Substantial predominance" requires the amount of a corporation's business activity in that one state be "significantly larger" than the amount in the state with the second-most operations. *Id.*

The hazards of these approaches are evident. Unlike the nerve center test, operations-based tests require complicated statistical analyses and uncertain balancing of multiple factors. These tests thus "produce the sort of vague boundary that is to be avoided in the area of subject matter jurisdiction wherever possible." *Sisson*, 497 U.S. at 375 (Scalia, J., concurring). And unlike the deliberate and readily-ascertainable choice of a corporate headquarters, the operations of a corporation must constantly change and respond to the vagaries of markets and demographics, and may move in and out of states on

a year-by-year, or even month-by-month, basis. Moreover, because of the subjective balancing inherent in such tests, a corporation could easily wind up with more than one "principal" place of business—in direct contravention of the statute—as different courts weigh the factors differently.

The Ninth Circuit's test amply demonstrates the perils of relying on operations-based tests. The test cannot be consistently applied, and can erroneously deem corporations with nationwide activities to be citizens of California merely because their California operations reflect that state's large population size. The test has so many factors that the statistics can easily be manipulated and will often require a trial before the trial with competing expert evidence.

To determine whether a corporation's activities "substantially predominate" over those in the next largest state, the Ninth Circuit requires "a comparison of that corporation's business activity in the state at issue to its business activity in other individual states." *Tosco*, 236 F.3d at 500. Various indeterminate factors are consulted to decide if a given state contains a substantial predominance of corporate activity, including "the location of employees, tangible property, production activities, sources of income, and where sales take place." *Id.*

Just listing these factors shows how imprecise and manipulable the inquiry is. Calculating the statistics and evaluating their relative weight can quickly devolve into a battle of the economic experts. And much, if not most, of the relevant data would be non-public, if not proprietary and confidential, requiring extensive and expensive discovery, often under protective orders. Like the similar tests of other circuits, this vague test "generates excessive

unpredictability and encourages expensive litigation to identify the 'principal place of business' for corporations that operate in multiple states." *Davis*, 557 F.3d at 1031 (Kleinfeld, J., concurring). This is an unacceptably inefficient use of judicial resources.

Moreover, prospective litigants will have no certainty that a corporation's principal place of business as determined by an operations test will not surreptitiously move itself somewhere else overnight due to changes in the economy or the company's business. A test that turns on the relative amounts of employees, tangible property, production activities, sources of income, and sales across the 50 states will yield different results over time as corporations continually reallocate their resources to meet market demands and economic conditions. This requires counsel to hit an ever-moving target just to make what should be the simple decision of where to file or remove a case. Even if a corporation's principal place of business has been determined in one case, it may well be different in the next.

These problems are particularly acute in the Ninth Circuit, where this case arose. That is because an operations-based test is especially susceptible to distortion by the effects of California's enormous population, which dwarfs that of any other state.[9] If a

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[9] In 2008, California's population was estimated at 36,756,666, or 12.09% of the total U.S. population. *See* U.S. Census Bureau, Annual Estimates of the Resident Population for the United States (www.census.gov/popest/states/tables/NST-EST2008-01.xls). The next largest state, Texas, had an estimated population of 24,326,974, or 8.17% of the total. *Id.* Thus, California's population is more than 50% greater than that of any other state.

company has operations in all states proportional to population, and predominance between the two largest states is the relevant determination, "California would be the 'principal place of business' for virtually every corporation because of its larger population." *Davis*, 557 F.3d at 1036 (Kleinfeld, J., concurring).

Thus, for example, Starbucks Corporation—world famous as a Seattle, Washington-based corporation—was nevertheless found to be a citizen of California under the Ninth Circuit's test. *Mbalati* v. *Starbucks Corp.*, No. CV-07-3267-RFG (C.D. Cal. June 17, 2007). United Airlines has its world headquarters in Chicago and operates all over the nation, but a California district court found that it is a citizen of California. *Ghaderi* v. *United Airlines, Inc.*, 136 F. Supp. 2d 1041 (N.D. Cal. 2001); *Burgos* v. *United Airlines, Inc.*, No. C-00-04717-WHA, 2002 WL 102607, *6 (N.D. Cal. 2002). Wholesaler Costco has its well-known home office in Washington, but a California district court found that it is a citizen of California. *Castaneda* v. *Costco Wholesale Corp.*, No. CV-08-7599-PSG, 2009 WL 81395, *2 n.2 (C.D. Cal. Jan. 9, 2009). And a district court in California recently found that Target Corporation's principal place of business is in California, although other courts have found it to be its headquarters in Minneapolis, Minnesota. *Compare Diaz* v. *Target Corp.*, No. CV-09-3477-PSG, 2009 WL 1941382, *3 (C.D. Cal. 2009) *with Felipe* v. *Target Corp.*, 572 F. Supp. 2d 455, 460-61 (S.D.N.Y. 2008).

For all these reasons, the "nerve center" test not only best comports with the plain language of the statute, but also provides the most predictable, efficient, and stable results. By contrast, any test that weighs the relative size of operations or

activities introduces intolerable unpredictability, inefficiency and instability as parties must wrangle through potentially protracted litigation just to decide where a case should be filed, with the prospect of reversal years later if that decision proves wrong.

III. THE "NERVE CENTER" TEST BEST EFFECTUATES CONGRESS'S INTENT AND THE UNDERLYING PURPOSES OF DIVERSITY JURISDICTION.

The nerve center test also best effectuates the underlying purposes of diversity jurisdiction, and Congress's specific intent expressed in the 1958 amendment. Congress sought to ensure both that a corporation would not be amenable to diversity jurisdiction in its actual "home" state—where it might be, on balance, less likely to experience local prejudice—and that its home state be easily identifiable.

A. The Nerve Center Test Comports With The Purposes Of Diversity Jurisdiction.

Diversity jurisdiction is predicated on "the supposition that, possibly, the state tribunal[s] might not be impartial between their own citizens and foreigners." *Pease* v. *Peck*, 59 U.S. (18 How.) 595, 599 (1856). *See also* The Federalist No. 80 (diversity jurisdiction ensures "the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial"). These concerns have particular resonance for corporations sued in state courts outside of their principal place of business, since they can unfairly be perceived by locally elected judges and local juries as "deep pockets" whose profits can easily be "imported." *See Davis*, 557 F.3d at 1037 (Kleinfeld, J., concurring) ("Jurors may have no prejudice at all against citizens and corporations

of other states, but still have a financial incentive to import their money"); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 28 (1948) (Framers based the diversity grant in part on "the desire to avoid regional prejudice against commercial litigants").

The "nerve center" test serves this purpose of avoiding the potential for local prejudice. In adopting the "principal place of business" test, Congress targeted the "evil" of limiting corporate citizenship only to the state of incorporation, which "gives the privilege of a choice of courts to a local corporation simply because it has a charter from another State, an advantage which another local corporation that obtained its charter in the home State does not have." S. Rep. 85-1830, at 3101-02 (1958). Thus, Congress intended to prevent "local" corporations from bypassing the state courts in their "home states."

The nerve center test ably identifies a corporation's "home state," where it is presumably least likely to experience local prejudice, by looking to the place—its headquarters—that the corporation has intentionally chosen as its home. A corporation in its home state "should be sufficiently 'local'—sufficiently identified with the state—to avoid the obloquy that may attach to a 'foreign' corporation in litigation with a local resident." *Dimmit*, 787 F.2d at 1190. For example, although Wal-Mart does most of its business elsewhere, it is readily identifiable as an Arkansas company because its headquarters are there, and that is the state where it is least likely to experience local prejudice as an "outsider," regardless of where its operations predominate from month-to-month or year-to-year.

A corporation makes a conscious decision about where to place its headquarters. This is a signature decision that reflects a corporation's identity. The location of the nerve center may be a product of the corporation's founding and carry all the history and meaning associated with that birth. Or it might reflect a subsequent symbolic change in location. Regardless, it is the center of a corporation's outreach to the nation and the world, and the place where—regardless of how far-flung the corporation's activities—people know to find it. It is *this* place, and not the unpredictable and ever-changing outcome of a statistical analysis, where the corporation has its "home" and where it is least in need of the protections of diversity jurisdiction. Judges and jurors in Arkansas, for example, do not need to look at reams of statistics from operations in other states to know that Wal-Mart is one of their own.

This test also comports with the manner in which Congress and this Court have determined other aspects of diversity jurisdiction. The other statutory basis for corporate citizenship—the state of incorporation—is likewise the product of choice, not imposition. The choice of a state of incorporation is typically an early and deliberate decision to avail the corporation of particular state laws. In fairness, the corporation could be said to agree to be amenable to the courts in the state where it incorporates.

Citizenship of individuals is also based on intentional acts, not judicial imposition. An individual who resides in more than one State is, for purposes of diversity jurisdiction, a citizen of but one State, that of his or her *domicile*. *Wachovia*, 546 U.S. at 318; *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 828 (1989). A person's domicile is a

single, intentionally chosen, place.[10] As the Court has stated, the domicile is "the technically preeminent *headquarters* that every person is compelled to have in order that certain rights and duties that have been attached to it by law may be determined." *Williamson* v. *Osenton*, 232 U.S. 619, 625 (1914) (emphasis added).

Just as individual citizenship is determined by the place a person chooses to be his or her personal "headquarters"—regardless of how many other residences he or she may have—so too should corporate citizenship be determined in the same way. This is so, moreover, regardless of whether the corporation has extensive operations outside its headquarters state. By way of analogy, a company headquartered abroad will likely (and perhaps unfairly) be perceived by U.S. residents as a foreign company, no matter how big its U.S. operations. Its headquarters thus should determine its citizenship. *See*, *e.g.*, *Eisenberg* v. *Comm. Union Assurance Co.*, 189 F. Supp. 500 (S.D.N.Y. 1960) (company with London headquarters was British citizen for purposes of diversity jurisdiction, regardless of the size of its U.S. operations). The same is true for U.S. companies headquartered outside a forum state. Even in the hypothetical situation where a corporation has the vast majority of its operations in the forum state but

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[10] *See Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989) (domicile is determined by physical presence combined with "one's intent to remain there"); *Texas* v. *Florida*, 306 U.S. 398, 429 (1939) (Frankfurter, J., concurring) ("a person must have one domicile, and can have only one"); *Morris* v. *Gilmer*, 129 U.S. 315, 328-29 (1889) (for domicile to change, "[t]here must be an actual, not pretended, change of domicil * * * The intention and the act must concur in order to effect such a change of domcil as constitutes a change of citizenship.").

its headquarters elsewhere, forum-state residents may well harbor unfair bias against a company that is controlled by out-of-staters and perceived as exporting all its profits to its home state.

To be sure, the nerve center test cannot identify the state where a corporation will, in fact, always experience the least local bias in every case. No test could ever do that. Diversity jurisdiction is based on the theoretical possibility of bias in a general sense, not its presence or absence in any specific case. But the nerve center test admirably effectuates the underlying purposes of the jurisdictional grant. Thus, even if one could envision hypothetical cases where local prejudice might be ameliorated outside the headquarters state, "[t]he time expended on such rare freakish cases will be saved many times over by a clear jurisdictional rule that makes it unnecessary to decide, in hundreds of other cases, what particular activities [create subject matter jurisdiction]." *Sisson*, 497 U.S. at 374-75 (Scalia, J., concurring).

Nor is it a valid objection to the nerve center test that corporations could, in theory, move their headquarters to avoid state courts in places where they have large operations. *Cf. Teal Energy USA, Inc.* v. *GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004). In the first place, such extreme circumstances would both reflect and reinforce the potential for local prejudice in the affected state. A corporation is unlikely to engage in such a significant endeavor absent the potential for such prejudice. And local residents are unlikely to look kindly on the company afterwards. But *amici* can attest that a decision to relocate a headquarters, unlike the relatively simple decision to reincorporate, is a costly endeavor undertaken neither lightly nor often. Relocating a headquarters

is far more costly than the filing papers of incorporation. It involves large sunk costs for real estate and other property, typically has tax consequences, and requires relocating senior management and their families. And at the end of the day, relocating a headquarters—for whatever reason—reflects a real change in the corporation's identity and thus its corporate citizenship for purposes of diversity jurisdiction.

Accordingly, a corporation's principal place of business for purposes of diversity jurisdiction is its headquarters, or "nerve center." That rule follows the plain language of the statute, provides certainty and efficiency on the threshold issue of jurisdiction, and effectuates the underlying purposes of the diversity grant.

B. Congress Rejected An Operations-Based Inquiry In Favor Of A Test That Looks To A Singular Principal Place Of Business.

The legislative history of Section 1332(c)(1) shows that Congress rejected proposed tests that would have looked to a corporation's operations. Instead, Congress chose Section 1332(c)(1)'s unambiguous and practical formula for determining a corporation's one principal place of business.

Before enactment of Section 1332(c)(1), corporations were citizens only of their states of incorporation, which led to a specific problem. Congress sought to prevent a corporation "which is in reality a local institution" from being able "to drag its litigation into the Federal courts because it has obtained a charter from another State." Report of the Committee on Jurisdiction and Venue (March 12, 1951), *reprinted* in S. Rep. No. 85-1830, at 3119. The

initial proposal was that a corporation "be deemed a citizen of any State in which it is doing business." *Id.* The Committee later determined, however, that this rule would "deny to business corporations doing business over a wide territory, the sort of protection which they need against local prejudice and the benefit of the salutary rules and practice of the Federal courts." *Id.* Such a rule would "create far more evil than it would cure." *Id.*

Next, the Committee proposed a test whereby a corporation seeking federal jurisdiction would have a burden to show that in the fiscal year prior to filing, "less than 50 percent of its gross income was derived from business transacted within the State where the Federal court is held." *Id.* at 3120. The Committee reasoned that "[a] corporation which receives more than half of its gross income from business within a single State is so closely tied to the local commercial fabric of that State as to be properly considered a citizen thereof, even though it may have been incorporated elsewhere." *Id.* But the gross income proposal was also scrapped, in favor of the "principal place of business" language. *Id.* at 3132. The Committee concluded that this rule "provides a simpler and more practical formula than our original suggestions which would have foreclosed the jurisdiction in States where more than half of the corporate gross income is received." *Id.*[11]

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[11] The Committee modeled its final language on then-extant provisions of the Bankruptcy Act, which had employed a "principal place of business" formulation. *Id.* at 3132. Under that provision, it had been held that a corporation's headquarters was its principal place of business. *See, e.g., Burdick* v. *Dillon*, 144 F. 737, 738 (1st Cir. 1906) ("according to ordinary understanding and speech, as well as according to the intent of Congress," the principal office where a company's "supreme

Thus, the Congressional drafters of Section 1332(c)(1) expressly rejected two different tests that would both have made the citizenship of a corporation turn in some way on its activities or operations in the states where it does business. The second of these rejected tests was very similar to the operations-based tests currently employed by some circuits, as it would have deemed a corporation to be a citizen of any state where it earned more than half its income. That test was rejected in favor of a "simpler and more practical" one, yet the current operations-based tests are even more complex and impractical. This express rejection of operations-based tests is persuasive evidence that Congress did not intend Section 1332(c)(1) to be interpreted in that manner.[12]

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direction and control" is exercised is its "principal place of business"); *Shearin* v. *Cortez Oil Co.*, 92 F.2d 855, 857 (5th Cir. 1937). The case law, however, was not uniform, with some courts applying operations-based tests. *See* Note, *A Corporation's Principal Place of Business for Purposes of Diversity Jurisdiction*, 44 Minn. L. Rev. 308, 316 (1959). Given this discrepancy, the actual content of prior Bankruptcy Act case law is not helpful in determining the intent of the 1958 amendment. Lindsey D. Saunders, *Determining a Corporation's Principal Place of Business: A Uniform Approach to Diversity Jurisdiction*, 90 Minn. L. Rev. 1475, 1479-80 (2006).

[12] *See, e.g.*, *Sec'y of the Interior* v. *Cal.*, 464 U.S. 312, 327 (1984) ("Since House § 313 would have provided respondents with precisely the protection they now seek here, it is significant that the Conference Committee, and ultimately the Congress as a whole, flatly rejected the provision."); *Thompson* v. *Thompson*, 484 U.S. 174, 183, 185 (1988) (exchange in committee hearing showing "Congress considered and rejected an approach to the problem" provided "unusually clear indication that Congress did not intend" jurisdiction to enforce state custody orders); *Smith* v. *United States*, 507 U.S. 197, 202

Congress has continued to refuse to adopt proposed operations tests. In 1990, the Federal Courts Study Committee recommended the limitation of diversity jurisdiction to a narrow set of circumstances. Fed. Courts Study Comm., Report of the Federal Courts Study Committee (Apr. 2, 1990), *reprinted in* 22 Conn. L. Rev. 733, 778 (1989-1990) As a "back-up proposal" the committee recommended that the statute be amended to "deem corporations to be citizens of every state in which they are licensed to do business." *Id.* at 782. Congress did not adopt that proposal, and has consistently supported diversity jurisdiction despite other attempts to undo it.[13]

Indeed, in 2005 Congress *strengthened* the protection of diversity jurisdiction through provisions included in the Class Action Fairness Act ("CAFA"), which provides greater ability for corporations to remove class action litigation to federal courts by requiring only minimal diversity between the parties. 28 U.S.C. § 1332(d)(2)(A). Congress sought to make it harder for "plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction," S. Rep. 109-14, at 5 (2005), and aimed to avoid forum-shopping and judge-shopping. *See* 151 Cong. Rec. S999 (Feb. 7, 2005) (statement of Sen. Spector).

However, under the Ninth Circuit's malleable test—which can deem nationwide corporations to be "local" California companies merely because they cater to California's large population—the incentive

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n.4 (1993) (rejecting interpretation that "would effectively resurrect the scheme rejected by Congress").

13 *See, e.g.*, 124 Cong. Rec. H5008–09 (Feb. 28, 1978) (rejected bill for "the abolition of diversity of citizenship jurisdiction in federal courts"); H.R. Rep. No. 95-893 (1978).

remains for plaintiffs to shop for potentially favorable state courts in California. CAFA's exceptions for so-called "home state" and "local" controversies preclude removal if certain conditions are met, including that a super-majority of putative class members and at least one significant defendant are from the state of original filing. *See* 28 U.S.C. §§ 1332(d)(4)(A), (B). If a company like Starbucks can be deemed a California corporation despite its well-known Washington identity, *see supra* at 16, then plaintiffs will continue to be encouraged to seek out California state courts for class actions against nationwide corporations that would otherwise be removable to federal court. By contrast, the easily-applied nerve center test eliminates that gamesmanship and best effectuates the intent of CAFA.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

No. 08-1107

In the Supreme Court of the United States

THE HERTZ CORPORATION, *PETITIONER*,

v.

MELINDA FRIEND, ET AL., *RESPONDENTS*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Legal Aid Society – Employment Law Center ("LAS–ELC") is a nonprofit organization representing low-wage workers in California. *Amicus* LAS–ELC has a strong interest in the effective implementation of California's independent laws protecting its employees. A full recitation of the interest of the LAS–ELC appears in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, California counsel seek to represent California plaintiffs under California law against a corporation that earns much more money and conducts far more business in California than in any other State.

In construing the scope of diversity jurisdiction under 28 U.S.C. § 1332(c)(1) – and of the Constitutional provision which both authorizes and limits such jurisdiction – this Court must give due consideration to the interests of the State of California and its citizens.

When corporations target California for its resources and markets, performing substantially

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[1] The parties have consented to the filing of this *amicus* brief. No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amicus*. Sup. Ct. R. 37.6.

more activity in our State than in any other, they should not be permitted to avoid the jurisdiction of our judiciary simply by citing to out-of-state headquarters.

Indeed, adopting the headquarters test propounded by Petitioner Hertz Corporation (hereinafter "Hertz") would encourage corporations predominantly active in California to manipulate jurisdiction by situating their headquarters across our borders. Imposing federal jurisdiction under such circumstances is far removed from the intent of the founders in drafting Article III, § 2, and is inconsistent with the language and purposes of the 1958 amendment to the Code.

Only a test founded on business realities begins to approach a reconciliation of the fundamental and competing interests at stake herein.

ARGUMENT

I. THIS COURT SHOULD CONSTRUE THE PROVISIONS AT ISSUE HERE WITH CONSIDERATION TO THE INTERESTS OF THE STATE OF CALIFORNIA AND ITS CITIZENS.

Over the past 150 years, California – the third largest State by land area, and currently the most populous State in the union – has built a booming economy featuring innovation and opportunity. Long a magnet for job seekers, entrepreneurs, and

corporate investment, California has simultaneously welcomed and supported enterprise while protecting the interests of its workers through an extensive network of statutory regulation. California's progressive workers' rights laws are frequently cited as models for enacting protections in other States and in Congress.[2]

Moreover, in service of its 37 million residents living throughout an area 250 miles by 750 miles, California has established a judiciary featuring 58 trial courts – one in each of its counties – with facilities in more than 450 locations.[3] The California

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[2] *See, e.g.*, Patricia A. Shiu and Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker's Right to Job-Protected, Paid Leave*, 21 YALE J.L. & FEMINISM 119, 143, 151 (2009) (noting that California's disability discrimination law has served as a model for federal changes, and its paid family leave law is serving as a model for other states); Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 14-15 (2006) (California's paid family leave law "could provide a model for the rest of the country"); Duane Morris LLP, *Recent California Employment Cases: Instructive for Employers in All States*, 2005 WLNR 14088574 (Mondaq Bus. Briefing, Sept. 7, 2005) ("The California judiciary has often set the stage for judicial precedents that are later adopted by other states."); *see also Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 288-89 (1987) (upholding California's pregnancy disability leave law against facial challenge on federal statutory grounds: "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs.").

[3] California Judicial Branch, Judicial Council of California, Administrative Office of the Courts, "Fact Sheet: California Judicial Branch" (2009),

court system is the nation's largest, and includes more than 2,000 judicial officers and 21,000 court employees.[4] The California Legislature determines the number of judges in each court, and vacancies are filled by the California governor. Judges are periodically subject to removal or continued service by the vote of the people of the State.[5]

By contrast, the federal judiciary offers 29 courts in 24 California locations; most California counties do not have a single federal courthouse.[6] There are only 158 federal judges and 55 federal magistrates serving California.[7] In another context, and in the report endorsing the Code provision at issue here, the Senate Judiciary Committee noted: "Very often cases removed to the Federal Courts require the workman to travel long distances and to bring his witnesses at great expense. This places an

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http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif_Judicial_Branch.pdf; California Judicial Branch, California Courts, "California Superior Courts," http://www.courtinfo.ca.gov/courts/trial/ (last visited Oct. 2, 2009); Wikipedia, California, http://en.wikipedia.org/wiki/California (listing area and population) (last visited Oct. 2, 2009).

[4] "Fact Sheet: California Judicial Branch," *supra* note 3, at 2, 3 (state appellate courts have 105 justices, state trial courts have 1,628 judges and 393 commissioners and referees); California Judicial Branch, Judicial Council of California, "About the California Judicial Branch," http://www.courtinfo.ca.gov/about/aboutjb.htm (last visited Oct. 2, 2009).

[5] "Fact Sheet: California Judicial Branch," *supra* note 3, at 3.

[6] U.S. Courts, Court Locator (interactive website), at http://www.uscourts.gov/courtlinks/ (last visited Oct. 2, 2009).

[7] Daily Journal Corporation, The Daily Journal California Court Directory (Apr. 2009), 5-11.

undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court." S. Rep. No. 1830, 85th Cong., 2d Sess., Report to Accompany H.R. 11102, at 9 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106. In this way diversity jurisdiction imposes a demonstrable bias against local litigants.

As an arm of the State government, the California judiciary has a special expertise and strong interest in construing the State's employment laws, and in administering the disputes that arise under these laws. *Accord* S. Rep. No. 109-14, P.L. 109-2, The Class Action Fairness Act of 2005, at 39, *reprinted in* 2005 U.S.C.C.A.N. 3, 38 ("[C]lass actions with a truly local focus should not be moved to federal court under this legislation because state courts have a strong interest in adjudicating such disputes."); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1836 (2008) (describing the "logic of federalism" as the principle that "[t] he federal courts should serve as the authoritative voice of federal law and national interests, and state courts should serve as the authoritative voices of state law and local interests.").

When corporations such as Petitioner Hertz target California to access its extensive resources, markets, and workforce and perform substantially more activity in our State than in any other, they must not be permitted to avoid the jurisdiction of the

California judiciary simply by citing to out-of-state headquarters.

A. The Court Should Assess Corporate Citizenship Within the Context of Shared State and Federal Power.

The scope of the Constitutional and statutory bases for diversity jurisdiction asserted by Petitioner Hertz must be assessed with due consideration to the interests of the State of California and its citizens. As Justice Louis Brandeis noted in 1923, "questions of jurisdiction are really questions of power between States and Nation." Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 713 (1993) (quoting a conversation between Brandeis and then-Professor Felix Frankfurter).

In seeking to defend and expand federal diversity jurisdiction in Congress and the federal courts, corporate entities have long cited to the purported bias of state courts against out-of-state defendants. The accuracy of this basis for diversity jurisdiction has been questioned.[8]

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[8] *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493 (1928) ("[S]uch information as we are able to gather from the reporters [regarding out-of-state defendants in state courts] entirely fails to show the existence of prejudice on the part of the state judges"); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 23 (1948) (noting that the work of Friendly and Frankfurter "casts grave doubts on the accuracy" of the local bias theory for diversity jurisdiction); EDWARD A. PURCELL, JR., LITIGATION AND

Of course, the actual motivations of corporate defendants are not secret. Corporations and their counsel have long viewed the federal courts to be a more favorable forum for their interests with respect to court location, summary judgment, class certification, the jury pool, the unanimous jury, perceived competence,[9] and the cultural and economic background of judges.[10] For analogous

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INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958 (1992), at 8 ("the identification of local 'prejudice' is a complex and problematic matter"); *id.* at 129 ("the dangers corporations faced from local prejudice may, in fact, have been considerably less than has often been claimed"); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1292 (2006) ("As was the case with local bias in the Progressive Era, [contemporary] empirical evidence attesting to or debunking the existence of local bias is scant."); *see also* William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*," 1993 WIS. L. REV. 1, 6 (1993) ("There are perfectly sound tactical reasons for a lawyer in a given case to welcome the presence of diversity jurisdiction, but they have almost nothing to do with the reason that kind of jurisdiction was created.").

[9] *Cf. Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 408 (7th Cir. 1989) ("[T] here is no reason to presume state courts are not competent to adjudicate [Title VII] issues. Such a notion overlooks the obvious; most states have enacted employment discrimination laws, which are routinely litigated in state courts, and state court judges are accordingly quite familiar with discrimination issues."), *aff'd*, 494 U.S. 820, 826 (1990) ("We have no reason to question the presumption that state courts are just as able as federal courts to adjudicate Title VII claims."); *see also* Marcus, *supra* note 8, at 1256 ("Of course, the very grant of diversity jurisdiction is itself a federalism-tinged insult, since it implies that organs of state government cannot properly ensure a just proceeding.").

[10] "Although they advanced a variety of arguments for retaining [diversity] jurisdiction, their defense seemed

reasons, lawyers representing workers and consumers, particularly in class actions, often prefer state courts. These considerations have deep historical roots,[11] and remain significant today. "[M]any lawyers continue to believe that, all else held equal, substantive outcomes differ depending on which sovereign decides the dispute[.]" Marcus, *supra* note 8, at 1280.[12]

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animated ultimately by neither jurisprudential principles nor ideas of systemic efficiency but by the desire of litigators to protect an exceptionally useful tactical tool and by the preference of elite lawyers and their corporate clients for federal forums." Purcell, Jr., *The Class Action Fairness Act in Perspective*, *supra* p. 4, at 1838.

[11] *See* Frank, *supra* note 8, at 28 (concluding that the creation of diversity jurisdiction was in part the product of the desire of commercial interests to litigate their controversies "before judges who would be firmly tied to their own interests"); PURCELL, JR., LITIGATION AND INEQUALITY, *supra* note 8, at 4-5, 8 (citing the "problems that relatively ordinary individuals faced when they were forced to dispute claims against national corporations that were capable of invoking the jurisdiction of the federal courts," noting that "national corporations and their attorneys consistently defended the legal rules that allowed them access to the national courts," and finding that "corporations gained powerful legal and extralegal advantages by using the federal courts"); *id.* at 22 ("studies have shown that corporate defendants repeatedly fared better in the federal than in the state courts"); *id.* at 54 (noting that lawyers who represented poorer individuals as plaintiffs were often familiar with state court and not federal court).

[12] *See also* Marcus, *supra* note 8, at 1304-05 ("[C]ontemporary practitioners believe that federal judges have less patience for state law class actions than their state counterparts.") (citing surveys of defense and plaintiffs' lawyers); Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 13 (2005); Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr., *Attorney Reports on the Impact*

Such tactical concerns are an accepted part of our legal and political systems. However, they cannot eliminate the requirement of assessing – within our Constitutional framework of federalism and the separation of state and federal powers – whether a corporation claiming diversity jurisdiction is truly a "Citizen" of a "different State [ ]," and/or whether its "principal place of business" is found in a State other than where it does the greatest portion of its business.[13] Such an assessment cannot delegate forum selection to corporate defendants,[14] but must

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of Amchem *and* Ortiz *on Choice of Federal or State Forum in Class Action Litigation: A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attorneys* 8 (2004).

[13] As one commentator has argued: "If federal judges truly differ in some systematic way from their state counterparts, these collective motivations create federalism implications for diversity jurisdiction. Particularly when federal judges systematically favor defendants in categories of disputes for which state law provides the rule of decision, the federal exercise of jurisdiction may mean that state law will receive less enforcement than if cases stay in state court. Diversity jurisdiction then affects the power of states to regulate the types of conduct that become the subject of these disputes. The assertion of federal jurisdiction thereby alters the federalism balance...." Marcus, *supra* note 8, at 1251, 1257.

[14] The existence of federal jurisdiction must be independently determined and cannot be delegated to or based upon the preferences of the parties. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (citations omitted).

include a real-world review of a corporation's actual activities within the State.

B. Business Realities Support a Finding that Hertz is a Citizen of California.

In this matter, business realities – including rental locations, leased real estate, employees, revenues, rental activity, and vehicle transactions – indicate that Petitioner Hertz is a citizen of the State of California under Article III, § 2, and has its "principal place of business" here for purposes of 28 U.S.C. § 1332(c)(1). It conducts far more business – and employs far more workers – in California than in any other State.

This is not merely a function of California's population. It is estimated that California's population is 12 percent of the United States population.[15] By its own admission, Petitioner Hertz conducts much more than 12 percent of its corporate activities in California.[16] Moreover, the unique features of California – its size and wealth – govern in favor of, not against, finding that many multi-

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[15] California's population is 36,756,666, compared to the United States population of 304,059,724. U.S. Census Bureau, State and County QuickFacts, California, at http://quickfacts.census.gov/qfd/states/06000.html (last visited Oct. 2, 2009).

[16] Seventeen percent of Hertz rental locations exist in California, including the largest location it operates (the location at LAX). More than 20 percent of Hertz employees work in California. More than 18 percent of Hertz's rental revenues and vehicle transactions come from California operations. Brief for Petitioner, *supra* p. 9, at App. 8a, 26a-29a.

state corporations are California citizens.

As the district court properly concluded, Hertz "is not the type of litigant that diversity jurisdiction was designed to protect." Brief for Petitioner-Appellant at App. 9a (District Court order filed Jan. 15, 2008) (citing and quoting from *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 502 (9th Cir. 2001)); *see also id.* at App. 3a (Ninth Circuit order filed Oct. 30, 2008) ("With its extensive California contacts and business activities, Hertz is not in jeopardy of being mistreated in California courts.").

II. THE RULE PROPOSED BY THE PETITIONER IS CONTRARY TO THE LANGUAGE AND PURPOSES OF THE 1958 AMENDMENTS.

In enacting the 1958 amendments to the Code, Congress followed and repeatedly cited the recommendations of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States. Pursuant to a study of the scope of federal jurisdiction and venue, the Committee had proposed legislation to relieve the increasingly heavy caseloads assigned to federal court judges. *See* Jack H. Friedenthal, *New Limitations on Federal Jurisdiction*, 11 STAN. L. REV. 213, 222-23 (1959) (reviewing history of amendment); Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong. (1957), *Foreword* ("The underlying purpose of the above legislation is to ease the current workload of

our Federal courts and reduce the tremendous backlog of cases which are presently pending on the court calendars.").

Following the Judicial Conference Committee's advice, Congress agreed to limit federal jurisdiction in several respects, including by curbing the extension of diversity jurisdiction to "local corporations which, because of a legal fiction, are considered citizens of another State." S. Rep. No. 1830 at 4, 1958 U.S.C.C.A.N. at 3102. Congress extended corporate citizenship to the entity's "principal place of business," and directed that this term be determined according to the precedents defining it for purposes of the Bankruptcy Act. S. Rep. No. 1830 at 5, 1958 U.S.C.C.A.N. at 3102 ("The proposal to rest the test of jurisdiction upon the 'principal place of business' of a corporation has ample precedent in the decisions of our courts and in Federal statute such as the provisions of the Bankruptcy Act.") (citation omitted).

"Most of the cases construing this phrase, 'principal place of business' under the Bankruptcy Act and Sections 1332 and 1441 are in accord that this finding always has been determined by an analysis of the totality of corporate activity rather than the mere determination of the location of executive offices." *Gilardi v. Atchison, Topeka & Santa Fe Rwy. Co.*, 189 F. Supp. 82, 86-87 (N.D. Ill. 1960) (reviewing pre-1958 case law to determine whether diversity jurisdiction existed); *accord* Friedenthal, *supra* p.10, at 223 ("The cases under the Bankruptcy Act provide no rigid legal formula

for the determination of the principal place of business. Rather they consider the issue to be a question of fact to be decided in light of all relevant evidence.").[17]

Congress's use of terms which have been previously construed indicates an intent to ratify such interpretations.[18] This result is consistent with

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[17] *See, e.g., Continental Coal Corp. v. Roszelle Bros.*, 242 F. 243, 246-47 (6th Cir. 1917) (reviewing factors including property and employees and finding that extensive mining operations in Kentucky and not corporate office in Tennessee determined "principal place of business"); *Lawrence v. Atl. Paper & Pulp Corp.*, 298 F. 246, 248-49 (5th Cir. 1924) (finding that principal place of business was state where manufacturing operations and property were located, not state where corporate meetings held); *Dryden v. Ranger Ref. & Pipe Line Co.*, 280 F. 257, 258, 263 (5th Cir. 1922) (finding that principal place of business located where corporation carried on business and interacted with customers, and not where internal management conducted); *In re Evans*, 12 F. Supp. 953, 954-56 (W.D. N.Y. 1935) (determining principal place of business by looking at locations of business transactions and creditors); *In re Monarch Oil Corp.*, 272 F. 524, 526 (S.D. Ohio 1920) (finding principal place of business located where corporation owned and operated oil wells, and not site of corporate offices).

[18] *See Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 134 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby."); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law....").

the legislative history, which was carefully reviewed by Judge Harold R. Tyler in 1963:

> Repeated use of the phrase "doing business" (and similar phrases), both in the report of the Senate Judiciary Committee, as well as during the debates on the floor of the House of Representatives, suggests that the legislators were intent upon tying, so far as reasonably possible, corporate citizenship to the realities of corporate business activity.
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> Finally, it may be pointed out that the Senate Judiciary Committee adopted the view that "the underlying purpose of diversity of citizenship legislation ... is to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries...."
>
> If the Committee regarded this as the principle under-lying diversity jurisdiction, then, *pro tanto*, it must have envisioned a test based chiefly on operations, since it is by visible presence, including the employment of local people, that a corporation will become popularly recognized as "domestic" rather than "foreign."

Inland Rubber Corp. v. Triple A Tire Serv. Inc., 220 F. Supp. 490, 495 (S.D.N.Y. 1963).

Such direction governs over a single phrase from witness Judge Albert B. Maris, testifying before

a 1957 House subcommittee on two prior iterations of the 1958 legislation.[19] *See Kelly v. Robinson*, 479 U.S. 36, 51 (1986) ("We acknowledge that a few comments in the hearings and the Bankruptcy Laws Commission Report may suggest that the language bears the interpretation adopted by the Second Circuit. But none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.") (citing *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) and 2A N. Singer, *Sutherland on*

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[19] Petitioner Hertz cites frequently to the 1957 transcript of a hearing before a subcommittee of the House Judiciary Committee regarding two previous iterations of the 1958 legislation, particularly for the testimony of Judge Albert B. Maris. Hearings on H.R. 2516 and H.R. 4497 Before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong. (1957). As noted in the transcript's foreword, "This document was compiled for the purpose of inviting further suggestions and comments ..." *Id.*, Judge Maris filled in for Chief Judge John J. Parker, who chaired the Judicial Conference Committee during its study of venue and jurisdiction. *Id.* at 9. He noted that he could not "adequately paraphrase Judge Parker if [he] wanted to." *Id.* at 27. Judge Maris then explained the background behind adopting the "principal place of business," noting: "That is the exact language of the Bankruptcy Act. There are a large number of cases in the books which construe just what that means, what is the principal place, and what is not the principal place of business of a corporation." *Id.* at 36. When asked about a corporation with activities in multiple states, Judge Maris noted that "[a]ll of those problems have arisen in bankruptcy cases" and added "I wouldn't want to be bound by this statement because I haven't them before me." *Id.* at 37. In determining the principal place of business, Judge Maris testified, "it would take a hearing in some cases to get to the facts as to the corporation." *Id.* at 38-39.

Statutory Construction § 48.10, pp. 319 and 321, n.11 (4th ed. 1984)).

Consistently, in construing the phrase "principal place of business" within the context of tax law, this Court has noted: "[W] e cannot develop an objective formula that yields a clear answer in every case. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case." *Commissioner of Internal Revenue v. Solomon*, 506 U.S. 168, 174-75 (1993), *superseded by statute*, Taxpayer Relief Act of 1997, Pub. L. 105-34, sec. 932(a), 111 Stat. 788, 881, *as recognized in Beale v. Commissioner*, T.C. Memo 2000-158 at 13 n.9 (2000). [20]

Notwithstanding this body of relevant case law, Petitioner Hertz proposes a bright-line rule assigning citizenship to the State in which a corporate entity has chosen to locate its headquarters. As set forth in Respondents' brief, such a rule would encourage corporations to manipulate jurisdiction by moving their headquarters across State borders. Resp. Brief at 38 to 43 (reviewing empirical evidence that corporations relocate their headquarters with frequency). In the case of California, corporations would evade state

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[20] Multiple factors govern many initial determinations by district court judges. *See, e.g., Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988) ("Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command."); Resp. Brief at 44 to 52.

court jurisdiction by moving their headquarters across our borders to Nevada or Arizona, or to distant states remote from the locus of corporate operations.

Such an outcome is contrary to the language and intent of the 1958 amendments. Congress sought to eliminate diversity jurisdiction where corporations are deemed a citizen of another State due only to legal fiction. *See* S. Rep. No. 1830 at 4, U.S.C.C.A.N. at 3102 ("It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen."); *accord Gilardi*, 189 F. Supp. at 88 ("To equate principal place of business to executive offices would ... run the risk of creating a substitute fiction for the fiction of charter citizenship."). The Petitioner's proposal will only create and encourage a substitute fiction.

Moreover, since 1958, federal court congestion – the very problem Congress sought to address with its amendment to § 1332(c)(1) – has not only continued but has sharply worsened.[21] In

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[21] Jessica Dye, "Judges Press Senate for More Federal Posts" (Law360, Sept. 30, 2009) ("Federal judges urged members of the U.S. Senate Judiciary Committee on Wednesday to take swift action to address skyrocketing caseloads and overextended judges in district and circuit courts across the country by authorizing the first significant federal judicial expansion since 1990. ... Judge Lawrence J. O'Neill of the U.S. District Court for the Eastern District of California said his district was by far under some of the heaviest pressure. ... Its most recent backlog report showed 591 civil cases pending

contravention of this central purpose, Petitioner's proposal would grant diversity jurisdiction to virtually all disputes with those corporations that locate their corporate offices in States remote from their actual operations.

Consistent with federalism and federal docket control, citizenship should not be divorced from the locus of the corporation's substantial and predominant relationships with a State's citizens. It is these real-world sales, purchases, leases, employment contracts, real estate transactions, and additional interactions that mark state interest and are the underlying facts of litigated disputes.[22] By rewarding the institution of distant headquarters, Petitioner's proposal will only exacerbate federal court congestion and emphasize corporate over state interests.

III. ONLY A RULE FOUNDED ON BUSINESS REALITIES APPROACHES A RECONCILIATION OF THE FUNDAMENTAL AND COMPETING INTERESTS AT ISSUE.

In conducting its business, Petitioner Hertz

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for more than three years in the Eastern California district, he said."), at http://legalindustry.law360.com/articles/123940.

[22] Again, California's size and wealth are factors that favor a finding of corporate citizenship. As a large state offering an extraordinary economy and labor force, and extensive urban and agricultural areas, California draws huge numbers of corporations, investors, and workers, and is naturally the site of extensive corporate interactions and the disputes that arise from such relationships.

has greatly benefited from its extensive and profitable contacts with the State of California. In particular, it employs substantially more workers and serves many more consumers in California than in any other State. It has engaged in these valuable relationships for decades while submitting to California's longstanding scheme of worker and consumer protections.

These contacts must matter in assessing Hertz's corporate citizenship. Otherwise the State's actual role in the operation of the Petitioner's business is erased via the sort of "legal fiction" decried by Congress in amending 28 U.S.C. § 1332(c)(1). Otherwise the word "Citizen" is a simply a word given over to corporate expediency with no consideration of state interests.

Moreover, a rule based on business realities furthers the desired goal of the 1958 amendment to reduce diversity jurisdiction. The State in which a corporation has more business dealings with customers, derives its largest portion of gross income, employs the most workers, and has its greatest contact with the public, is likely to be where the bulk of litigation arises.

The majority of Circuits requires a review of real-world, in-state relationships and exchanges in assessing corporate citizenship. As reviewed in the party briefs, the Ninth Circuit directs that courts, as an initial matter, apply the "place of operations" test. This test properly grants citizenship to any corporation with the "bulk of corporate activity" in a

particular State. Only if there is no such predominance in a single State can the location of corporate headquarters be considered. [23]

Additional Circuits – including the Fifth,[24] Sixth,[25] Eighth,[26] Tenth,[27] and Eleventh[28] Circuits –

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[23] *Tosco Corp. v. Comtys. for a Better Environment*, 236 F.3d 495, 500 (9th Cir. 2001) (holding that where a substantial predominance of a corporation's business activity takes place in one state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state, and noting that "[t] he Ninth Circuit employs a number of factors to determine if a given state contains a substantial predominance of corporate activity, including the location of employees, tangible property, production activities, sources of income, and where sales take place."); *see also Indus. Tectonics v. Aero Alloy*, 912 F.2d 1090, 1092 n.3, 1094 (9th Cir.1990) (noting the "general rule that the 'bulk of corporate activity,' as evidenced by operating, administrative, and management activities, determines a corporation's principal place of business," and concluding: "[T]he principal place of business should be the place where the corporation conducts the most activity that is visible and impacts the public, so that it is least likely to suffer from prejudice against outsiders.").

[24] *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401, 405-06, 411-12 (5th Cir. 1987) (reviewing pre-1958 bankruptcy cases, adopting total activities test, and noting: "We also see as significant the degree to which the corporation's activities bring it into contact with the community. In examining the corporation's local contacts, we look at the number of employees in the given locale and the extent to which the corporation participates in the community through purchase of products, supplies and services, sales of finished goods, and membership in local trade or other organizations.").

[25] *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162-63 (6th Cir. 1993) (adopting total activities test and noting: "But we think the place where the principal office is located is not necessarily the place where the principal business is carried on. Such may or may not be the case.") (citation omitted).

apply a "total activities" test, which assesses a broad range of tangible factors related to the actual scope and substance of corporate activities.[29]

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[26] *Capitol Indem. Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 836 (8th Cir. 2004) (adopting total activities test).

[27] *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993) (adopting total activity test, described as approach which "'considers a variety of factors, such as the location of the corporation's nerve center, administrative offices, production facilities, employees, etc., and it balances these factors in light of the facts of each case," and noting that "the determination of a corporation's principal place of business does not hinge on one particular facet of corporate operations, but on the total activity of the company considered as a whole.").

[28] *Vareka Invs., N.V. v. Am. Inv. Props., Inc.*, 724 F.2d 907, 910 (11th Cir. 1984) (adopting total activities test).

[29] A few Circuits use a similar assessment in some – but not all – situations. *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005) (noting that "nerve center" test applies to "farflung corporations or corporations without physical operations, but holding that "the principal place of business of a corporation that has the bulk of its physical operations in one state is to be determined under the locus of operations test, even if the corporation's executive offices are in another state"); *R. G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651 (2d Cir. 1979) (describing "nerve center" test as applicable "[w]here corporate operations are spread across numerous states," but otherwise permitting "focus instead upon the state in which a corporation has its most extensive contacts with, or greatest impact on, the general public"); *Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999) (noting that Circuit applies "nerve center" test "when a corporation engages primarily in the ownership and management of geographically diverse investment assets," but applies the "place of operations" test focusing on "the place where the bulk of corporate activity takes place" when the corporation has "multiple centers of manufacturing, purchasing, or sales") (citation omitted).

Importantly, the factors identified as relevant to citizenship under the "place of operations" test and the "total activities" test are identifiable and knowable – a district court may without difficulty request and examine evidence of sales, purchases, profits, real property, equipment, employees, public contacts, and the like. Such an assessment covers ground familiar to federal court judges. *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317-20 (1945) (reviewing manufacturing, distribution, solicitations, rentals, and sales in determining personal jurisdiction over corporation).

Given the fundamental and competing interests at stake when imposing diversity jurisdiction, such in-state relationships and exchanges should be given substantial weight. Moreover, those authorities which permit for purposes of diversity jurisdiction a finding of citizenship based solely upon the location of a corporation's headquarters should be rejected.[30]

CONCLUSION

Where, as here, a corporation has

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[30] *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) (adopting "nerve center" test, described as the rule that "a corporation has a single principal place of business where its executive headquarters are located"); *cf. Mennen Co. v. Atlantic Mut. Ins. Co.*, 147 F.3d 287, 291 (3d Cir. 1998) (noting that the most important factor in finding the principal place of business is "the headquarters of day-to-day corporate activity and management"). *See also* citations in footnote 25 (permitting application of "nerve center" test in particular cases).

substantially more material presence in California than in any other State, its California citizenship should be presumed. Petitioner's writ should be denied, and the case remanded to California Superior Court.

Respectfully submitted,

October 6, 2009

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Founded in 1916, the **Legal Aid Society – Employment Law Center ("LAS–ELC")** is the oldest nonprofit legal organization in the Western United States. The LAS-ELC represents California workers in cases covering a broad range of employment issues including wage and hour claims and discrimination on the basis of race, gender, age, disability, pregnancy, national origin, sexual orientation and sexual identity.

In 1914, responding to the egregious working conditions of migrant agricultural workers, the California Legislature established a State Commission of Immigration and Housing charged with enforcing the Labor Camp Sanitation Act of 1913.

By 1915, the Commission planned the establishment of a Legal Aid Society in San Francisco. Patterned after free legal clinics that had been in operation in New York and Germany since 1876, the San Francisco effort was headed by the Vice President of the Commission and the Archbishop of the Diocese of San Francisco.

The Legal Aid Society of San Francisco opened its doors for business on May 1, 1916. Then, as now, the mission of the Society was to offer free legal services to individuals without resources. "The services of the Society are free to all persons, regardless of nationality, who are without means to employ attorneys to press their just claims or represent them in court." Annual Report (1916-1917). By its ten-year anniversary, the Society had handled more than 9,000 cases.

In 1970, the Society recommitted itself to

advocacy on behalf of the employment rights of individuals, finding that such advocacy is critical to the economic self-sufficiency of workers.

Today, nearly a century after its inception, and serving thousands of working people a year, the organization calls itself the Legal Aid Society - Employment Law Center. One of the country's foremost nonprofit legal entities, the LAS–ELC operates according to the principle that all people are entitled to work in an environment that is safe, respectful, free from discrimination, and in compliance with the law.